DOCKET

No. 08-598
Title: David Bobby, Warden, Petitioner
v.
Michael Bies
Docketed: November 5, 2008
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (06-3471)
Decision Date: February 27, 2008
Rehearing Denied: August 5, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 3 2008	Petition for a writ of certiorari filed. (Response due December 5, 2008)
Nov 3 2008	Appendix of David Bobby, Warden filed.
Dec 5 2008	Brief of respondent Michael Bies in opposition filed.
Dec 15 2008	Reply of petitioner David Bobby, Warden filed. (Distributed)
Dec 17 2008	DISTRIBUTED for Conference of January 9, 2009.
Jan 12 2009	DISTRIBUTED for Conference of January 16, 2009.
Jan 16 2009	Petition GRANTED The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The brief of respondent is to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 23 2009	SET FOR ARGUMENT ON Monday, April 27, 2009.
Feb 23 2009	Joint appendix filed. Statement of costs received.
Feb 23 2009	Brief of petitioner David Bobby, Warden filed.
Mar 10 2009	Motion for leave to proceed in forma pauperis filed by respondent Michael Bies.
Mar 10 2009	Record received from U.s.C.A. for Sixth Circuit. (1 binder)
Mar 19 2009	CIRCULATED.
Mar 19 2009	Record received from the U.S.D.C. for the Southern District of Ohio. (4 boxes)
Mar 25 2009	Motion DISTRIBUTED for Conference of April 17, 2009.
Mar 25 2009	Brief of respondent Michael Bies filed. (Distributed)
Apr 8 2009	Reply of petitioner David Bobby, Warden filed. (Distributed)
Apr 20 2009	Motion for leave to proceed further herein in forma pauperis filed by respondent GRANTED.
Apr 27 2009	Argued. For petitioner: Benjamin C. Mizer, Solicitor General, Columbus, Ohio. For respondent: John H. Blume, Ithaca, N.Y.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Benjamin C. Mizer Counsel of Record	Solicitor General Office of the Attorney General 30 E. Broad Street, 17th Floor	(614) 466-8980

	Columbus, OH 43215-3428 benjamin.mizer@ohioattorneygeneral.gov	
Party name: David Bobby, Warden		
Attorneys for Respondent:		
John H. Blume Counsel of Record	Cornell Law School Myron Taylor Hall Ithaca, NY 14853 jb94@cornell.edu	(607) 255-1030
Party name: Michael Bies		
Randall L. Porter	Office of Ohio Public Defender 8 East Long St., 11th Fl. Columbus, OH 43215-2998	(614) 466-5394
Party name: Michael Bies		

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 08-____

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

MICHAEL BIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Board St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-566-5087 fax

Counsel for Petitioner
David Bobby, Warden

CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of "acquittal" that conflicts with this Court's decisions?

2. Do the Double Jeopardy Clause's protections apply to a state post-conviction hearing on the question of a death-sentenced inmate's mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), that does not expose the inmate to the risk of any additional criminal punishment?

3. Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause's collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate's mental retardation under *Atkins* even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Margaret Bagley. See Fed. R. Civ. P. 25(d).

The Respondent is Michael Bies, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, Warden, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008), is reproduced at App. 33a-66a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc, *Bies v. Bagley*, 535 F.3d 520 (6th Cir. 2008), is reproduced at App. 1a-32a. The United States District Court for the Southern District of Ohio's order is reproduced at App. 67a-68a. The state post-conviction court's opinion and orders, denying the petition for post-conviction relief, are reproduced at App. 95a-105a. The Ohio Supreme Court's opinion in *State v. Bies*, 658 N.E.2d 754, 756 (Ohio 1996), affirming Bies's conviction and sentence, is reproduced at App. 106a-128a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on August 5, 2008. The State timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any person be

subject for the same offence to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

More than ten years ago, the Ohio Supreme Court upheld the death sentence imposed on Respondent Michael Bies for the brutal murder of a ten-year-old boy. In a conclusory statement in its

decision, the court remarked that evidence of "Bies's personality disorder and mild to borderline mental retardation merit[s] some weight in mitigation." App. 120a. But the court found that the heinous and cruel nature of the crime, among other aggravating factors, outweighed this mitigating evidence beyond a reasonable doubt.

Even though the Ohio Supreme Court made its off-hand comment on Bies's mitigating evidence in a decision *upholding* Bies's death-penalty conviction, the Sixth Circuit nevertheless found that the statement was legally conclusive in establishing that Bies was *ineligible* for the death penalty. The Sixth Circuit reached this contorted result by concluding, on double jeopardy grounds, that the Ohio court's statement precluded the State from submitting evidence in a state post-conviction hearing to determine whether Bies is ineligible for capital punishment because he is mentally retarded within the meaning of *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Sixth Circuit's holding runs contrary to fundamental double jeopardy principles and warrants this Court's review for three reasons. First, jeopardy never terminated in Bies's case because no court has ever "acquitted" Bies on a sentence of death. On the contrary, every level of Ohio court has agreed that the death penalty is appropriate in Bies's case, and thus the Sixth Circuit was wrong to treat the *imposition* of the death penalty as an "acquittal." Second, a state post-conviction proceeding under *Atkins* does not twice put Bies in jeopardy of life or limb because it does not expose him to the risk of an additional criminal

sanction. Third, the Double Jeopardy Clause's collateral estoppel component does not apply to Bies's case because the Ohio Supreme Court did not actually and necessarily find that he is mentally retarded under *Atkins*.

The Sixth Circuit's decision is without precedent. The Warden is aware of no case in any other court that has barred an *Atkins* hearing on such a novel double-jeopardy theory. More to the point, because the state court's decision to proceed with the *Atkins* hearing was consistent with this Court's clearly established precedent, the Sixth Circuit's contrary conclusion violated the constraints of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

This Court should grant review to reverse the Sixth Circuit's erroneous grant of the writ.

STATEMENT OF THE CASE

A. Bies was convicted and sentenced to death for the murder of a ten-year-old boy.

On May 12, 1992, police uncovered the body of ten-year-old Aaron Raines in the basement of an abandoned building in Cincinnati. App. 106a. The autopsy showed that Raines died from multiple blunt injuries to his head, neck, chest, and abdomen. App. 109a. He suffered nineteen separate lacerations to his scalp, five broken ribs, and a collapsed lung, and the left side of his face was flattened because of severe skull fractures. App. 108a-109a. Raines's injuries suggested that he had been severely beaten

with a piece of concrete and a metal pipe, strangled with a piece of twine, and kicked. App. 108a.

After a nine-week investigation, the police concluded that Bies and an accomplice, Darryl Gumm, murdered Raines. App. 109a. The two men lured the boy into the abandoned building with the intent to rape him. App. 107a. When Raines resisted, they beat him and left his body in the basement. App. 107a-108a. When officers later questioned Bies about the murder, Bies made inculpatory statements about his role. App. 109a.

Bies was indicted and later convicted of aggravated murder, attempted rape, and kidnapping. App. 110a. During the penalty phase of his trial, in way of mitigation, Bies offered an unsworn statement through his attorney asking for mercy. *Id.* He also presented the testimony of a clinical psychologist, Donna E. Winter. The Ohio Supreme Court recounted Winter's testimony:

> Winter reviewed an evaluation made of Bies when he was three years old, in which he was characterized as being "violent and uncontrollable." Hospital records of Bies indicated that he was abused during his childhood, and that his upbringing was chaotic, neglectful and violent. Between the ages of five and thirteen, Bies had made several suicide attempts or threats. Bies was too disruptive for public school, so he was placed in several different special schools. Winter believes that Bies is still a very impulsive person, who at times cannot control his anger and

> becomes hostile. Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded. Although Winter described Bies as a "very dense individual" lacking common sense, she conceded that everyone who evaluated Bies, including herself, concluded that Bies knew right from wrong at the time of the murder.

App. 110a-111a. The jury recommended a sentence of death, which the trial court imposed. App. 111a. The Ohio court of appeals affirmed the conviction and sentence. *Id.*[1]

B. The Ohio Supreme Court affirmed Bies's conviction and sentence on direct review.

On Bies's direct appeal as of right, the Ohio Supreme Court conducted an independent review of Bies's death sentence for appropriateness and proportionality, as Ohio law requires. See Ohio Rev. Code § 2929.05. Referencing Winter's testimony, the court stated that "Bies's personality disorder and mild to borderline mental retardation merit some weight in mitigation." App. 120a. It further noted that Bies lacked a significant criminal record and that he had a violent and unstable family environment. *Id.* Nevertheless, the court concluded that the aggravating circumstances, including the

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[1] Bies's accomplice, Gumm, was also convicted of murder, attempted rape, and kidnapping, and sentenced to death. See *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995). His death sentence was later vacated after the state post-conviction court found, consistent with *Atkins*, that Gumm was mentally retarded. See *State v. Gumm*, 864 N.E.2d 133 (Ohio Ct. App. 2006).

heinous and brutal nature of the crime, "outweigh[ed] the mitigating factors beyond a reasonable doubt." App. 121a. The court therefore affirmed the sentence.

C. The state courts rejected Bies's petitions for post-conviction relief.

Bies filed his first petition for post-conviction relief in the state court of common pleas, arguing, among other things, that the Eighth Amendment's cruel and unusual punishment clause bars his execution because he is mentally retarded. The court rejected the claim on its merits. The Ohio court of appeals affirmed, concluding that Bies had waived his Eighth Amendment claim by not raising it on direct appeal. See *State v. Bies*, 1999 Ohio App. Lexis 3108, *18 (Ohio Ct. App. June 30, 1999). The Ohio Supreme Court dismissed the appeal without a decision. See *State v. Bies*, 719 N.E.2d 4 (Ohio 1999).

Bies then filed a petition for writ of habeas corpus in federal district court, arguing again that the Eighth Amendment bars his execution because he is mentally retarded. While that petition was still pending, Bies filed a second post-conviction petition in the state courts. The court of common pleas dismissed the petition, and the Ohio court of appeals affirmed. See *State v. Bies*, 2003 Ohio App. Lexis 459 (Ohio Ct. App. Jan. 31, 2003). The Ohio Supreme Court dismissed the appeal without a decision. See *State v. Bies*, 788 N.E.2d 648 (Ohio 2003).

After this Court issued its decision in *Atkins*, Bies—at the direction of the federal district court—filed a third petition for post-conviction relief in state

court. He then moved for summary judgment on that petition, arguing that the trial record affirmatively established the fact of his mental retardation, that the Ohio Supreme Court recognized his mental retardation on direct appeal, and that double jeopardy precluded the State from taking a contrary position.

The court of common pleas denied summary judgment, finding that a factual dispute existed in the record as to Bies's I.Q. score, and that the Ohio Supreme Court had not, for *Atkins* purposes, conclusively determined the issue of mental retardation in its earlier opinion: "Because the issues were not identified and the analysis of *Lott* and *Atkins* had not yet been established by the Courts, the Court does not find that the State is precluded from arguing that Mr. Bies is not mentally retarded." App. 104a.

Bies filed a renewed motion for summary judgment, arguing expressly that a hearing would put him twice in jeopardy on the question of his mental retardation. The court of common pleas denied the motion without further comment, referencing its prior decision. App. 95a.

D. Bies returned to federal court to pursue his double jeopardy claim.

After the state court denied his summary judgment motion, Bies returned to federal district court on his double jeopardy theory. The district court granted him leave to amend his petition to include the claim and bifurcated the proceedings to expedite its consideration. In March 2006, the district court granted the writ, agreeing with the

magistrate judge's recommendation that the Double Jeopardy Clause applied to Bies's case and that the Ohio courts had adjudicated the issue of Bies's mental retardation. App. 67a-68a.

On appeal, the Sixth Circuit affirmed the grant of the writ. The panel first held that the Double Jeopardy Clause applies to the penalty phase of a capital trial whenever "a judge or jury enters findings sufficient to establish a legal entitlement to a life sentence." App. 45a (internal quotations, citation, and alteration omitted). The panel then held that the Ohio Supreme Court actually and necessarily decided the issue of Bies's mental retardation on direct appeal in 1996 using the standards that it would adopt six years later in the wake of *Atkins*. App. 47a-57a. And that finding, the Sixth Circuit reasoned, entitled Bies to a life sentence. Finally, the court concluded that the State was collaterally estopped from challenging the fact of Bies's retardation because the State had a full and fair opportunity to litigate the issue on direct appeal. App. 58a-59a.

The State sought panel rehearing or rehearing en banc, which the court denied over Judge Sutton's dissent. App. 1a-2a. Judge Sutton concluded that the Double Jeopardy Clause does not apply to Bies because Bies had never received an "acquittal"; instead, the state courts had affirmed his sentence of death. App. 22a-23a. Judge Sutton further objected to the panel's application of collateral estoppel rules. He noted that that the Ohio Supreme Court did not actually decide the issue of Bies's mental retardation under *Atkins* because that court examined the issue only through the lens of a mitigation analysis:

> The mitigation and *Atkins* inquiries flow from different constitutional requirements under the Eighth Amendment—the requirement that capital defendants receive individualized consideration of mitigating factors and the categorical (i.e., non-individualized) requirement that those who are mentally retarded not be executed due to the diminished deterrent value of the death penalty on, and the diminished culpability of, such individuals.

App. 26a-27a (internal citations omitted). Finally, Judge Sutton explained that the issue of Bies's mental retardation was not necessary to the Ohio Supreme Court's decision affirming the imposition of a death sentence: "Far from being necessary to the judgment, the Ohio courts' mental-retardation findings cut against it—making them quintessentially the kinds of rulings not eligible for issue-preclusion treatment." App. 27a

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's grant of habeas relief departs from settled law and violates AEDPA's clear strictures in three ways. First and foremost, the state post-conviction court's rejection of Bies's double jeopardy claim was consistent with clearly established federal law. In the penalty phase of a capital murder trial, jeopardy terminates only upon an "acquittal"—when "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland v. Arizona*, 476 U.S. 147, 155

(1986) (alteration and internal quotation marks omitted). No such judgment has ever been rendered in this case. Instead, all of the relevant sentencing bodies—the jury, the trial court, the Ohio court of appeals, and the Ohio Supreme Court—expressly endorsed a death sentence for Bies. Because jeopardy never terminated, the Double Jeopardy Clause does not apply.

Second, the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (internal citations omitted). Bies has never been exposed to the possibility of multiple criminal punishments for his murder offense. Rather, Bies has initiated state post-conviction proceedings in which *he* seeks to vacate his original punishment.

Third, even if the Double Jeopardy Clause applies to this case, its collateral estoppel component does not bar a state court hearing on Bies's *Atkins* claim. After examining the record, the state post-conviction court correctly concluded that the Ohio Supreme Court had not actually and necessarily determined whether Bies's "mild to borderline mental retardation" qualified as a complete bar to the death penalty under *Atkins*. That ruling is consistent with pronouncements from the Ohio Supreme Court and the Ohio appellate courts distinguishing the penalty-phase inquiry, which looks to the presence of a defendant's mental retardation as a potential mitigating factor, from the *Atkins* inquiry, which assesses whether the

magnitude of the defendant's retardation bars the imposition of the death penalty.

A. The Ohio Supreme Court's decision affirming Bies's conviction and death sentence did not trigger the Double Jeopardy Clause's protections.

The Sixth Circuit's decision overlooked a critical element of the double-jeopardy analysis—that jeopardy must "terminate" with respect to the offense in question before constitutional protections are triggered. See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) ("[O]nce a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense."). Specifically, jeopardy terminates when a defendant is "acquitted"—meaning either that the factfinder found him not guilty of the elements of the offense, see *United States v. Scott*, 437 U.S. 82, 97 (1978), or, in the death-penalty context, that the sentencer found that the prosecution failed to prove its case for a capital sentence, see *Sattazahn*, 537 U.S. at 109 ("[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'"); *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984) ("[T]he Double Jeopardy Clause prohibits the State from resentencing the defendant to death after the sentencer has in effect acquitted the defendant of that penalty.").

Every Ohio court that examined the appropriateness of the death penalty in Bies's case—the state trial court, the Ohio court of appeals, and the Ohio Supreme Court—determined that the

prosecution had proven its case for the death penalty. Accordingly, Bies was not "acquitted" of capital punishment, jeopardy never terminated, and the Double Jeopardy Clause was never triggered. The Sixth Circuit's contrary holding—that the Ohio Supreme Court "acquitted" Bies when it simply mentioned his mild to borderline mental retardation in its opinion—is not only incorrect, but also barred by AEDPA.

1. No "acquittal" occurs when the jury imposes, and the appellate courts affirm, a sentence of death.

"[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" *Sattazahn*, 537 U.S. at 109. In this context, the definition of an "acquittal" is well-settled: "[T]he proper inquiry is whether the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland*, 476 U.S. at 155 (alteration and internal quotation marks omitted). Put another way, the sentencer must make "findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Sattazahn*, 537 U.S. at 108.

By definition, a capital defendant is not "acquitted" when he or she is sentenced to death. See *Poland*, 476 U.S. at 156 ("This concern [of the Double Jeopardy Clause] with protecting the finality of acquittals is not implicated when . . . a defendant is sentenced to death, *i.e.*, 'convicted.'"). Instead, the Double Jeopardy Clause requires a triggering event—a judgment or dismissal that terminates jeopardy with respect to offense in question—before

its protections attach. See *Richardson v. United States*, 468 U.S. 317, 325 (1984) ("[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.").

No such triggering event occurs when a court, during the penalty phase, makes factual findings that do not preclude a sentence of death. This Court's decision in *Poland v. Arizona* is instructive. The prosecutors in that case presented two aggravating factors: (1) the defendants expected pecuniary value from the murder, and (2) their crime was especially heinous, cruel, or depraved. 476 U.S. at 149. The trial court held that the State established the second factor but not the first, because the crime was not a contract killing. *Id.* It imposed a death sentence for both defendants. The Arizona Supreme Court later reversed the convictions, finding error in the guilt phase and penalty phase. *Id.* at 150. With respect to the penalty phase, the court held (1) that the trial court improperly limited application of the pecuniary-gain factor to contract killings, and (2) that the State had not presented sufficient evidence to establish that the defendant's crime was especially heinous, cruel, or depraved. *Id.*

After the defendants were again convicted on retrial, the State introduced additional evidence supporting the two original aggravating factors as well as a third aggravating circumstance (previous conviction of a violent felony). *Id.* The trial judge found all three aggravating circumstances and reimposed death sentences, and the Arizona Supreme Court affirmed. *Id.* at 150-51.

The question before this Court was whether the Double Jeopardy Clause precluded Arizona from seeking the death penalty on retrial because the defendants had been independently "acquitted" during the first trial of each aggravating factor. *Id.* at 155. The Court disagreed with the defendants' argument "that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an 'acquittal' of that circumstance for double jeopardy purposes." *Id.* The Court also rejected the characterization of the penalty-phase proceeding as "a set of minitrials on the existence of each aggravating circumstance." *Id.* at 156. Instead, the Court explained, "the proper inquiry" for "acquittal" purposes "is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate.*" *Id.* at 155 (internal citation omitted). Because the defendants had not been "acquitted" within the meaning of the Double Jeopardy Clause in the first trial, Arizona could relitigate any aggravating factor at the second trial.

Poland's holding applies with full force to this case. Even if the Ohio Supreme Court recognized the fact of Bies's mental retardation—a doubtful proposition given the court's merely passing reference to the issue—it affirmed the imposition of the death penalty as an appropriate punishment. Therefore, Bies was never "acquitted," and the Double Jeopardy Clause does not preclude the State from relitigating the issue of mental retardation.

Despite *Poland*'s clear applicability to this case, the Sixth Circuit adopted a different definition of the term "acquittal": "In the context of a capital

sentence," the court said, "a criminal defendant is protected against double jeopardy when a judge or jury 'enter[s] findings sufficient to establish legal entitlement to the life sentence.'" App. 45a (quoting *Sattazahn*, 537 U.S. at 109). Applying that definition, the Sixth Circuit concluded that Bies was "acquitted" when the Ohio Supreme Court noted that he suffered from "mild to borderline mental retardation," and that statement sufficed to establish legal entitlement to a life sentence.

The Sixth Circuit's new definition of "acquittal," however, distorts the very case on which it relies. In *Sattazahn*, the defendant was convicted of first-degree murder, but when the jury could not agree unanimously on whether to impose a death sentence, the trial court, consistent with state law, entered a default sentence of life. 537 U.S. at 104-05. The state appellate court reversed the conviction because of a faulty jury instruction, and on retrial the jury again convicted Sattazahn of first-degree murder, but elected to impose a death sentence. *Id.* at 105.

In finding no double-jeopardy bar to imposing the death penalty at the second trial, the Court focused on the definition of "acquittal." See *id.* at 108 (asking whether the "first life sentence was . . . based on findings sufficient to establish legal entitlement to the life sentence—*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt."). The defendant did not receive an "acquittal" at his first trial, the Court held, because no judgment had been made as to the appropriateness of the death penalty. *Id.* at 109.

Life imprisonment was simply the default option. Cf. *United States v. Peoples*, 360 F.3d 892, 895 (8th Cir. 2004) ("The mere imposition of a life sentence is not enough; there must be an affirmative choice by the jury not to impose a death sentence."). Accordingly, jeopardy never terminated and Pennsylvania was free to seek a death sentence at the second trial.

The critical factor in determining whether an "acquittal" occurred, then, is whether the sentencer or reviewing court has found that the death penalty is not appropriate. This Court followed that same approach in *Arizona v. Rumsey*, where the trial court imposed a life sentence after it "entered findings denying the existence of each of the seven statutory aggravating circumstances." 467 U.S. at 211. After the Arizona Supreme Court found error and remanded for a new sentencing proceeding, the trial court imposed a death sentence. *Id.* at 207-08. This Court found a double jeopardy violation because the trial court's earlier judgment was based on an explicit finding that the State had not proven the existence of *any* aggravating circumstance. The Court explained that "[t]hat judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Id.* at 211.

In this case, no factfinder—neither the jury nor any reviewing court—ever found that Bies was entitled to a life sentence. On the contrary, the Ohio courts unanimously held precisely the opposite: that Bies's death sentence should be affirmed.

The Sixth Circuit therefore stretched the double-jeopardy rule beyond all bounds when it

somehow ruled that the imposition of a *death sentence* may constitute an "acquittal" under the Double Jeopardy Clause. Nothing in *Poland*, *Sattazahn*, or *Rumsey* supports this holding, and the panel did not cite, nor can the Warden locate, any authority supporting this proposition. And the reason why no such authority exists is easy to ascertain: In no sense can a verdict of death be characterized as "an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for [the defendant's] offense." *Rumsey*, 467 U.S. at 211.

The state trial court, the state appellate court, and the Ohio Supreme Court all agreed that the prosecution had proven its case that the death penalty was an appropriate punishment for Bies. "[B]ecause the reviewing court[s] did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty 'acquittal.'" *Poland*, 476 U.S. at 157. Accordingly, jeopardy never terminated, the protections of the Double Jeopardy Clause were never triggered, and the Sixth Circuit's contrary conclusion was erroneous.

2. The Sixth Circuit's contrary ruling, even if correct, was not clearly established federal law at the time of the state court's decision.

Under AEDPA, Bies must establish that the Ohio court's decision was "contrary to" or "an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1). On state post-conviction review, Bies presented his double-jeopardy argument in both his summary judgment motion and his

renewed motion for summary judgment. The state court denied both motions. Because the court did not specifically explain its reasoning in rejecting Bies's double jeopardy claim, the "unreasonable application" prong of § 2254(d)(1) does not apply. See *Bugh v. Mitchell*, 329 F.3d 496, 507-08 (6th Cir. 2003). Thus, the question is whether the state court's decision was "contrary to" clearly established federal law—that is, whether it "applie[d] a rule that contradicts the governing law set forth" by this Court or "confront[ed] a set of facts that [were] materially indistinguishable from a decision of this Court and nevertheless arrive[d] at a result different from [this Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

At the time of the state post-conviction court's decision, all relevant Supreme Court authorities defined an "acquittal" at the penalty phase of a capital murder trial as the prosecutor's failure to convince the jury or reviewing court that death was the appropriate punishment. In other words, an "acquittal" necessarily required the imposition of a life sentence. See *Sattazahn*, 537 U.S. at 108 (asking "whether a first life sentence was an 'acquittal' based on . . . findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt"); *Poland*, 476 U.S. at 154 ("Plainly, the sentencing judge did not acquit, for he imposed the death penalty."); *Rumsey*, 467 U.S. at 211 (asking whether the "initial sentence of life imprisonment was . . . an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for [the defendant's] offense"). Because the State convinced the jury and the reviewing courts that death was an

appropriate punishment for Bies, the state post-conviction court's denial of Bies's double jeopardy claim was not contrary to any of those precedents.

The Sixth Circuit's ruling that individual factual findings by a reviewing court may function as an "acquittal," even if the same court affirms the death sentence, clearly extends those precedents. Under the panel's framework, the Ohio Supreme Court's passing observation that Bies suffered from "mild to borderline mental retardation" converted into an "acquittal" in 2002, when this Court issued its opinion in *Atkins*. Even if that analysis were correct (and it is not), the state post-conviction court's contrary decision did not contradict this Court's clear case law. No decision by this Court has ever recognized an "acquittal" based on events that occurred years after the defendant's conviction had become final.

Because Bies does not meet the requirements for habeas relief either on the merits of his double jeopardy claim or under the strictures of AEDPA, the Sixth Circuit's grant of the writ should be reversed.

B. A state post-conviction proceeding on the question of Bies's mental retardation does not twice put Bies in jeopardy because (a) it does not expose him to the risk of additional criminal sanctions, and (b) the State did not initiate the proceeding.

Even if Bies somehow was "acquitted" of the death penalty, the Sixth Circuit failed to address the second critical element of the double-jeopardy analysis—that a successive proceeding must place

the defendant at the risk of additional criminal sanctions. "The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." *Hudson*, 522 U.S. at 99 (internal citations omitted). If no criminal sanction is possible as a product of the proceeding, the defendant cannot claim any protection from the Double Jeopardy Clause. See *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) ("[T]he double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.").

The Double Jeopardy Clause does not protect Bies from factfinding on the question of his mental retardation in state post-conviction proceedings because those proceedings are "quasi-civil" in nature. *State v. Nichols*, 463 N.E.2d 375, 377 (Ohio 1984). Because they do not place Bies at the risk of any *additional* punishment—criminal or otherwise—for his murder of Aaron Raines, the Double Jeopardy Clause simply does not apply. Cf. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) ("[T]he forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments.").

Moreover, it was Bies, not the State, who initiated the state post-conviction proceedings. Cf. *United States v. Balsys*, 524 U.S. 666, 673 (1998) ("[N]one of [the Fifth Amendment's] provisions is implicated *except by action of the government* that it binds.") (emphasis added). As Judge Sutton explained in his dissent from the denial of rehearing

en banc, "Bies was never 'twice put in jeopardy' in the post-conviction claim *he* filed in state court. Quite to the contrary: he was taking a second run at vacating his death sentence—which is assuredly his right but just as assuredly does not offend the double-jeopardy bar." App. 23a. Accordingly, the Sixth Circuit's grant of the writ should be reversed.

C. The Sixth Circuit misapplied the rules of collateral estoppel to preclude the State from challenging Bies's claim of mental retardation under *Atkins*.

In the context of a federal criminal proceeding, "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." *United States v. Dixon*, 509 U.S. 688, 705 (1993) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. Specifically, relitigation of a factual issue will be precluded where the issue has already been "*actually* and *necessarily* determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added).

As discussed above, the State has not "lost" an earlier prosecution. Accordingly, double jeopardy has not been triggered and the doctrine of collateral estoppel does not bear on the resolution of this case. And assuming that double jeopardy did apply, the state post-conviction court's rejection of Bies's collateral estoppel argument was not contrary to or

an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254(d)(1). See *Schiro v. Farley*, 510 U.S. 222, 232 (1994) (explaining that the preclusive effect of an earlier criminal proceeding is a question of law). The Sixth Circuit was wrong to have second-guessed it.

1. The Ohio Supreme Court did not actually determine the fact of Bies's mental retardation under *Atkins*.

When it affirmed his death sentence in 1996, the Ohio Supreme Court offered a conclusory statement that Bies's evidence of "mild to borderline mental retardation merit[s] some weight in mitigation." App. 120a. The court did not explain how it arrived at this observation, nor did it offer a definition or standard of mental retardation.

Six years later in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Ohio Supreme Court implemented this Court's directive in *Atkins* to "develop 'appropriate ways to enforce the constitutional restrictions' on executing the mentally retarded." *Id.* at 1014 (quoting *Atkins*, 536 U.S. at 317). The inquiry would be guided by three standards: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Id.* The court further held that an I.Q. score above 70 established a rebuttable presumption that the defendant was not mentally retarded. *Id.* Nevertheless, it cautioned that I.Q. score alone was not sufficient to make a final determination on the issue. *Id.*

In light of this sequence—affirmance of Bies's conviction and sentence on direct review, followed years later by *Lott*'s implementation of *Atkins*—the state post-conviction court rejected Bies's assertion that the Ohio Supreme Court had actually determined the question of his mental retardation for purposes of the Eighth Amendment. It specifically noted that *Atkins* and *Lott* had not yet been decided at the time of his direct appeal. App. 104a.

This ruling was objectively reasonable. In 2002, the Ohio Supreme Court and the Sixth Circuit observed that the State of Ohio had no standards for assessing claims of mental retardation. See *Lott*, 779 N.E.2d at 1014 (noting "the absence of a statutory framework to determine mental retardation"); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death."). In light of *Lott* and *Hill*, the state post-conviction court logically concluded that the Ohio Supreme Court could not have decided the issue of Bies's mental retardation for purposes of the Eighth Amendment before 2002.

Moreover, the Ohio Supreme Court in *Lott* recognized that *Atkins* claims, by their very nature, involve disputed issues of fact that are "best resolved in the trial court." 779 N.E.2d at 1014. A proper inquiry requires de novo fact-finding, reliance on professional evaluations, taking expert testimony, and issuing a written opinion. *Id.* at 1015. The Ohio Supreme Court's brief, conclusory statement that Bies suffered "mild to borderline mental retardation" carries none of the hallmarks of the requisite *Atkins*

fact-finding. Accordingly, the state post-conviction court reasonably found that the Ohio appellate courts had not determined the fact of Bies's mental retardation for Eighth Amendment purposes.

Finally, the state post-conviction court's ruling is consistent with pronouncements from every Ohio appellate court that has compared the penalty-phase inquiry into mental retardation with the *Lott* inquiry into mental retardation. These courts uniformly have concluded that the two proceedings address different issues. As one court succinctly put it, "[t]he mitigation hearing, by definition, [does] not address the three-part test for mental retardation set forth in *Atkins* and adopted by Ohio in *Lott*." *State v. Lorraine*, 2005 Ohio 2529, ¶ 29 (Ohio Ct. App. May 20, 2005); see also *State v. Bays*, 824 N.E.2d 167, 171 (Ohio Ct. App. 2005) ("Although the expert testimony presented at Bays's mitigation hearing regarding his intellectual limitations is relevant to Bays's *Atkins* claim, it was not developed either to prove or to disprove the issue presented by his *Atkins* claim—whether Bays is so impaired that his execution would constitute cruel and unusual punishment."); *State v. Hughbanks*, 823 N.E.2d 544, 548 (Ohio Ct. App. 2004) ("But the penalty-phase evidence was offered to probe the issue of whether his mental illness mitigated against the imposition of the death penalty. It was not intended to probe the issue, posed by his *Atkins* claim, of whether he fell within the range of mentally retarded offenders whose execution the Eighth Amendment prohibited."); *State v. Carter*, 813 N.E.2d 78, 83 (Ohio Ct. App. 2004) (same). See generally App. 26a-27a (Sutton, J., dissenting from denial of rehearing en banc) ("The mitigation and *Atkins* inquiries flow from different

constitutional requirements under the Eighth Amendment—the requirement that capital defendants receive individualized consideration of mitigating factors and the categorical (i.e., non-individualized) requirement that those who are mentally retarded not be executed . . . ." (internal citation omitted)).

With no mention of AEDPA, the Sixth Circuit reached the opposite conclusion. The panel observed that the Ohio Supreme Court's "finding that [Bies] is mentally retarded was based solely on the diagnosis of Dr. Donna Winter," and it concluded that Dr. Winter "applied the same clinical method of diagnosing mental retardation which was described by the court in *Lott*." App. 51a. Therefore, "the state supreme court applied the same clinical definition of mental retardation in its determination that [Bies] is mentally retarded as it did in deciding *Lott*." App. 49a.

This reasoning improperly assumes that because Dr. Winter applied the diagnostic method that was later outlined in *Lott*, the Ohio Supreme Court must have decided the question using that standard as well. But the Ohio Supreme Court nowhere indicated that it was aware of or applied the standards that it would promulgate six years later in response to *Atkins*. Rather, as shown by the opinion's summary of the testimony, the court's passing observation that Bies suffered from "mild to borderline mental retardation" appears to have been based primarily on Dr. Winter's assessment of Bies's I.Q. score. See App. 111a ("Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded."). And the Ohio Supreme Court

underscored in *Lott* that I.Q. score alone does not suffice to establish mental retardation. See 779 N.E.2d at 1014.

In any event, the Sixth Circuit's independent analysis of the collateral estoppel doctrine in this case is beside the point. What matters is that the state post-conviction court concluded that the Ohio Supreme Court had not actually decided the issue of Bies's retardation under the Eighth Amendment, and that conclusion was well supported: *Atkins* and *Lott* had not been decided at the time of the direct appeal, the Ohio Supreme Court's opinion is devoid of analysis on the mental retardation issue, and a wealth of Ohio case law has distinguished the *Lott* inquiry from the penalty-phase mitigation inquiry. The state court's ruling therefore was not contrary to or an unreasonable application of this Court's precedents.

2. The fact of Bies's mental retardation under *Atkins* was not necessary to the Ohio Supreme Court's affirmance of Bies's death sentence.

Collateral estoppel "'attaches only to determinations that were *necessary* to support the judgment'"—in this case, the ultimate decision affirming the death penalty. *Schiro*, 510 U.S. at 233 (quoting 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4421, p. 192 (1981)) (emphasis added). Even a cursory familiarity with Ohio's death-penalty scheme demonstrates the flaw in the Sixth Circuit's conclusion that a finding on Bies's mental retardation was "necessary" to the Ohio Supreme Court's judgment affirming his death

sentence. As Judge Sutton explained in his dissent from the denial of rehearing en banc, "[f]ar from being necessary to the judgment, the Ohio courts' mental-retardation findings cut against it—making them quintessentially the kinds of rulings not eligible for issue-preclusion treatment." App. 27a.

Ohio law requires the state appellate courts to conduct an independent assessment of the imposition of the death penalty, including a weighing of aggravating and mitigating factors presented during the penalty phase. See Ohio Rev. Code § 2929.05(A). The Sixth Circuit reasoned that, as part of the weighing process, the state appellate courts must necessarily engage in fact-finding. See App. 56a ("[B]ecause a sentencing court's inquiry is open ended, determining which mitigating factors are actually present in a case is a necessary first step to determining whether those factors outweigh the aggravating circumstances."). And, reasoned the Sixth Circuit, because the Ohio Supreme Court weighed Bies's "mild to borderline mental retardation" as a mitigating factor, it necessarily must have found that Bies had established that fact. App. 57a. But that analysis conflates two distinct sets of findings: the statutorily requisite balancing of aggravating and mitigating circumstances on the one hand, and post-*Atkins* mental-retardation findings on the other.

Although the Ohio Supreme Court has a statutory obligation to identify all relevant mitigating factors in its analysis of whether the death penalty is an appropriate punishment for a particular defendant, mental-retardation findings were not necessary for it to affirm or reverse Bies's

death sentence. Before *Atkins*, proof of a defendant's mental retardation was not particularly germane to the analysis of whether a death sentence was an appropriate punishment. See *State v. Rojas*, 592 N.E.2d 1376, 1383 (Ohio 1992) ("[W]e do not find, in this case or from empirical evidence generally, that a fixed correlation can be made between a defendant's level of intelligence and a defendant's moral culpability."). The issue of mental retardation emerged as a significant factor in the mitigation calculus only if the defendant established a specific link between his retardation and his crime. See, e.g., *State v. Gumm*, 653 N.E.2d 253, 270 (Ohio 1995) ("[D]espite his low IQ, Gumm is able to distinguish right from wrong . . . ."); *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) ("[W]e find a very tenuous relationship between the acts he committed and his level of mental retardation."); *State v. Jenkins*, 473 N.E.2d 264, 301-02 (Ohio Ct. App. 1984) ("There was no evidence to suggest that appellant's low intelligence distorted the decision-making process he employed in perpetrating this robbery and murder . . . .").

In this case, although Dr. Winter testified that Bies suffered from mild to borderline retardation, she did not link that condition to Bies's crime. Accordingly, the Ohio Supreme Court had no need to pass on the credibility of her testimony; it was not necessary to the determination that a death sentence was an appropriate punishment for Bies. See *State v. Hill*, 2008 Ohio 3509, ¶ 56 (Ohio Ct. App. July 11, 2008) ("There was no reason for the State to contest the evidence of retardation . . . because that evidence did not link Hill's alleged retardation with his culpability for the murder of Raymond Fife. Without

this connection, the fact that Hill might be mentally retarded was not particularly relevant to whether Hill could be executed.").

Because the issue of Bies's mental retardation under *Atkins* was not a necessary component of the Ohio Supreme Court's decision affirming Bies's death sentence, the Sixth Circuit was wrong to hold that the State was collaterally estopped from litigating the issue in a later *Atkins* proceeding in state court.

3. The Sixth Circuit's ruling deprives the State—and only the State—of a full and fair opportunity to litigate claims of mental retardation under *Atkins*.

As a final matter, the Sixth Circuit rejected the State's argument that it did not have a full and fair opportunity to litigate the fact of Bies's mental retardation in proceedings before the Ohio court of appeals and the Ohio Supreme Court because the law had changed. "Petitioner's mental retardation was a contested issue," the Sixth Circuit said. App. 58a. "In briefs before both courts, both parties presented arguments and cited evidence in the record regarding whether Petitioner suffers from mental retardation." *Id.* This analysis fails to recognize the legal significance of mental retardation claims before and after *Atkins*.

Under well-established case law, "collateral estoppel may not be invoked when controlling facts or legal principles have changed significantly." *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987); see also *Montana v. United States*, 440 U.S. at 155 (same). "Preclusion is most

readily defeated by specific Supreme Court overruling of precedent relied upon in reaching the first decision." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4425, p. 674 (2002).

At the time of Bies's conviction, the issue of mental retardation had only tangential relevance to the sentencing phase of a capital trial. This Court had held the Eighth Amendment did not proscribe the execution of mentally retarded defendants. See *Penry v. Lynaugh*, 492 U.S. 302 (1989). And, as discussed above, although defendants often presented mental retardation as a possible mitigating factor in the sentencing calculus, they were rarely successful because they could not link the condition to their crime. The State therefore had little incentive to mount a vigorous defense to Bies's claim of retardation.

Atkins changed this landscape. In proscribing the execution of mentally retarded defendants under the Eighth Amendment, this Court expressly disavowed *Penry* and directed the States to implement the new constitutional mandate. See *Atkins*, 536 U.S. at 317. The Ohio Supreme Court immediately recognized the gravity of *Atkins*, refusing to preclude defendants from relitigating claims of mental retardation under *Atkins* even though they had unsuccessfully raised the issue of retardation during the penalty phase of their trials. See *Lott*, 779 N.E.2d at 1015.

The Sixth Circuit's ruling unfairly binds the State—and only the State—to decisions and rulings made in the pre-*Atkins* legal landscape where the fact of a defendant's mental retardation was not a

dispositive or persuasive factor in the death-penalty calculus. In light of the dramatic reconfiguration of that landscape after *Atkins*, the State must be afforded the same opportunity as habeas petitioners to litigate claims of mental retardation on a clean slate. The Sixth Circuit's ruling should be corrected before this errant precedent is applied, in the Sixth Circuit and elsewhere, to other capital defendants who introduced evidence of their limited intellectual functioning in pre-*Atkins* penalty-phase proceedings.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
David Bobby, Warden

November 3, 2008

APPENDIX

Supreme Court, U.S.
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No. 08-____

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

MICHAEL BIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
David Bobby, Warden

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 08a0279p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BIES,
Petitioner-Appellee,

v.

MARGARET BAGLEY, Warden
Respondent-Appellant,

No. 06-3471

Filed: August 5, 2008

Before: DAUGHTREY, MOORE, and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and less

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* Judge Cook recused herself from participation in this ruling.

than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

CLAY, Circuit Judge, concurring in the denial of rehearing *en banc*. When a court "enter[s] findings sufficient to establish legal entitlement to the life sentence," the Double Jeopardy Clause "bars any retrial of the appropriateness of the death penalty." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108, 109 (2003). Furthermore, under *Atkins v. Virginia*, 536 U.S. 304 (2002), "death is not a suitable punishment for a mentally retarded criminal." *Id.* at 321. Therefore, when the Ohio Supreme Court entered a finding that Michael Bies is mentally retarded, *State v. Bies*, 658 N.E.2d 754, 761 (Ohio 1996), that finding barred any future trial regarding whether Bies could be executed, and every Article III judge to hear Bies' case has said as much. *See Bies v. Bagley*, 519 F.3d 324, 329 342 (6th Cir. 2008). Nevertheless, the dissent from the denial of rehearing *en banc* attempts to argue that the uncontroversial issues presented by Bies' case somehow warrant *en banc* review. This opinion explains why *Bies v. Bagley* does not require such an extraordinary procedure.

I.

On October 13, 1992, Michael Bies was found guilty, by an Ohio jury, of kidnapping, attempted rape and murder. During the sentencing phase of his

trial, Bies introduced the testimony of Dr. Donna Winter, a licensed clinical psychologist, who testified both that Petitioner has an IQ of 69, and that he possesses all the traits necessary for a clinical diagnosis of mental retardation. Dr. Winter's testimony was corroborated by a letter from Dr. Myron S. Fridman, another licensed clinical psychologist who diagnosed Petitioner as a "marginally functioning, mildly mentally retarded man. . . ." *Bies*, 519 F.3d at 327. Nevertheless, the jury recommended the death sentence, and on October 30, 1992, the trial court accepted this recommendation.

Bies appealed his sentence to the Ohio Court of Appeal, and eventually to the Ohio Supreme Court. Although both courts affirmed the death sentence, both courts also expressly held that Bies is mentally retarded, and the state supreme court explicitly credited Dr. Winter's diagnosis in making this finding. *See Bies*, 658 N.E.2d at 761; *State v. Bies*, No. C-920841, 1994 WL 102196 at * 9 (Ohio Ct.App. March 30, 1994).

On June 20, 2002, the Supreme Court decided *Atkins v. Virginia*, which held that mentally retarded individuals cannot constitutionally be executed. *See* 536 U.S. at 321. In light of *Atkins*, Bies challenged his death sentence in a habeas petition filed pursuant to 28 U.S.C. § 2254. After Bies exhausted his remedies in state court, the district court held that, under the Double Jeopardy Clause, the government could not relitigate the already-decided question of whether Bies is mentally retarded, and thus held that *Atkins* entitles Bies to a sentence other than death. *Bies*, 519 F.3d at 329. In a unanimous decision, a panel of this Court affirmed.

Id. at 342.

II.

Under existing Supreme Court precedent, a person challenging their death sentence may claim relief under two separate double jeopardy doctrines. The first of these doctrines, which the panel opinion in *Bies* largely relied upon, stems from *Ashe v. Swenson*, 397 U.S. 436 (1970), which held that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; *Bies*, 519 F.3d at 332. As the panel opinion explained, this holding in *Ashe* incorporates the collateral estoppel doctrine into in the Double Jeopardy Clause. *Bies*, 519 F.3d at 332–33. To bar relitigation of an issue under the collateral estoppel doctrine, four requirements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Id. at 333 (quoting *N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n*, 821 F.2d 328, 330 (6th Cir.1987) (footnotes omitted)).

In *Sattazahn v. Pennsylvania*, the Supreme Court described a second avenue which a death row

inmate may pursue in challenging their sentence under the Double Jeopardy Clause. Under *Sattazahn*, once a judge or jury has "acquitted" a capital defendant "by entering findings sufficient to establish legal entitlement to the life sentence," jeopardy attaches to such an "acquittal," and the defendant cannot again be placed in danger of a death sentence for the same offense. 537 U.S. at 108–09. Unlike collateral estoppel, which is available to capital and non-capital defendants alike, *see Ashe*, 397 U.S. at 446 (applying collateral estoppel to benefit a robbery defendant), *Sattazahn* affords double jeopardy protections to capital defendants above and beyond those enjoyed by persons accused of less serious crimes; ensuring that once a defendant is declared entitled to a life sentence, that declaration will not be relitigated. 537 U.S. 108–09; *see also Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.")

Focusing on *Sattazahn*'s use of the word "acquittal," the dissent claims that we must limit application of the Double Jeopardy Clause to the circumstances described in *Poland v. Arizona*, 476 U.S. 147 (1986). In *Poland*, the Supreme Court held that a defendant is protected against a second capital sentencing proceeding when the court in the first proceeding, "'decid[ed] that the prosecution has not proved its case' for the death penalty and hence has 'acquitted' petitioners." 476 U.S. at 154 (quoting *Bullington v. Missouri*, 451 U.S. 430, 443 (1981)). In *Sattazahn*, however, the Court clarified *Poland*'s holding, explaining that, unlike other cases where double jeopardy shielded a defendant against a second capital sentencing hearing, "in *Poland* . . .

neither the judge nor the jury had 'acquitted' the defendant in his first capital-sentencing proceeding by *entering findings sufficient to establish legal entitlement to the life sentence*." *Sattazahn*, 537 U.S. at 108–09 (emphasis added).

As this language from *Sattazahn* makes clear, the Supreme Court understands *Poland* to establish two propositions. First, the Double Jeopardy Clause prohibits a second capital sentencing proceeding when the first such proceeding results in an "acquittal." *Id.* Just as importantly, however, *Sattazahn* defines an acquittal as a judgment which enters "findings sufficient to establish legal entitlement to the life sentence." *Id.*

This understanding of *Sattazahn* is consistent with the facts underlying Poland, which concerned capital defendants who, after their conviction and capital sentence was overturned by a state appellate court, were retried and again sentenced to death. *Poland*, 476 U.S. at 150. At the first trial, the prosecution argued that two statutory aggravating circumstances were present in the defendants' act of murder: (1) "[defendants] had committed the offense as consideration for the receipt, or in expectation of the receipt, of [something] of pecuniary value; and (2) [defendants] had committed the offense in an especially heinous, cruel, or depraved manner." *Id.* at 149 (internal citations and quotation marks omitted). Although the trial court found that the second aggravating circumstance was present, it also concluded that the first circumstance did not exist because, as a matter of law, that circumstance could only exist in a case involving a "contract killing." *Id.*

On appeal, the Arizona Supreme Court held

that the Poland defendants' verdict was tainted, and thus ordered a new trial. *Id.* at 150. In so holding, however, the state supreme court held both that the evidence presented in the first trial did not show that the defendants had acted in a "heinous, cruel, or depraved manner," and that the trial court was incorrect, as a matter of law, in holding that the "pecuniary value" aggravating factor could only be applied to contract killings. *Id.* On remand, the defendants were once again convicted and sentenced to death, and the trial court found both aggravating factors were present.

In light of these facts, *Sattazahn*'s holding that a court acquits a defendant "by entering findings sufficient to establish legal entitlement to the life sentence" is consistent with *Poland*'s holding that the defendants in that case were not entitled to relief under the Double Jeopardy Clause. In their first trial, the *Poland* defendants were sentenced to death pursuant to the trial court's factually unsupported conclusion that one aggravating circumstance was present, and its legally erroneous conclusion that another did not apply. *Id.* Although the state supreme court reversed the trial court's factual determination that the defendants' crime was committed in a "heinous, cruel, or depraved manner," it also reversed the trial court's legal determination that the pecuniary value aggravating circumstance was not present. *Id.* Thus, at no point did a court enter a finding of fact that no aggravating circumstances were present in *Poland*, thus entitling the *Poland* defendants to a life sentence.

Unlike *Poland*, however, in *Bies*, a court did issue a finding of fact which entitles Bies to a life sentence. On direct appeal of Bies' sentence, the Ohio

Supreme Court found that Bies is mentally retarded, as that term is clinically defined. *See Bies*, 658 N.E.2d at 761. Because such a finding renders Bies constitutionally ineligible for the death penalty, *see Atkins*, 536 U.S. at 321; *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002), it amounts to an "acquittal" under *Sattazahn*, and thus jeopardy attaches to the determination that Bies is mentally retarded. *Sattazahn*, 537 U.S. at 108–09.

III.

Although *Sattazahn* provides sufficient grounds to hold that Michael Bies cannot constitutionally be forced to relitigate the issue of his mental retardation, the panel instead relied on collateral estoppel principles incorporated into the Double Jeopardy Clause by *Ashe*. *Bies*, 519 F.3d at 332–40. As the panel explained at length in its opinion, Bies has proved each of the four elements necessary to assert collateral estoppel; that is, he has shown that: (1) the question of his mental retardation was raised and actually litigated in the prior proceeding; (2) determination of this issue was necessary to the outcome of that proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the government had a full and fair opportunity to litigate the question of whether Bies is mentally retarded. *Id.* at 333 (citing *N.A.A.C.P.*, 821 F.2d at 330).

The dissent does not contest that the panel applied the correct legal standard in holding that *Bies* must prove these four elements in order to succeed under *Ashe*. Instead, the dissent argues that the panel erred in determining both that Bies' mental retardation was raised and litigated before

the Ohio Supreme Court, and that determination of this issue was necessary to the outcome of that proceeding. Neither of these claims has merit.

A. "Actually Litigated"

The dissent argues that "the constitutionality of Bies' death sentence was not 'actually . . . determined' by the state courts because saying that Bies suffered from mild mental retardation in deciding the mitigating factors that counsel against a death sentence is not the same thing as saying that Bies is ineligible for the death penalty under *Atkins*." Dissenting Op. at 12. Essentially, this argument claims that, though the Ohio Supreme Court made a finding of fact during its resolution of one legal issue, that same finding of fact may now be relitigated in the context of a different legal inquiry.

The Supreme Court disagrees with the dissent, however. In *Turner v. Arkansas*, 407 U.S. 366 (1972), Dennis Turner was charged with murdering Larry Wayne Yates during a poker game, but was acquitted upon the jury's finding that Turner was not present at the game. *Id.* at 366, 369. Subsequent to his acquittal on the murder charge, Turner was charged with robbing another member of the same poker game. *Id.* 368. The two trials presented two very different legal questions; the first concerned whether Turner could be convicted of murder, and the second whether he could be convicted of robbery. Nevertheless, the Supreme Court applied collateral estoppel, holding that once a court made the factual determination that Turner was not present at the poker game, the state could not constitutionally claim that Turner was actually at that poker game in a future proceeding. *Id.* at

369–70.

The instant case is controlled by *Turner*. On direct appeal, the Ohio Supreme Court determined, under the clinically accepted definition of the term, that Michael Bies is mentally retarded. Because a person who is mentally retarded under the clinical definition of that term cannot constitutional be executed in the State of Ohio, *see Atkins*, 536 U.S. at 317; *Lott*, 779 N.E.2d at 1014, Bies now argues that he cannot be executed. Though Bies' *Atkins* claim raises a different legal issue than the one originally considered by the Ohio Supreme Court, both claims involve the same issue of *fact*; the Ohio Supreme Court determined that Bies is mentally retarded, as that term is clinically defined, and the government does not contest that if Bies is mentally retarded, he cannot constitutionally be executed. *See Atkins*, 536 U.S. at 316–17. Moreover, under *Turner*, the State is not free to contest Bies' mental retardation. Once a factual issue "has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. This rule applies even if the future lawsuit concerns a different question of law. *See Turner*, 407 U.S. at 369–70. Accordingly, the panel did not err in holding that the government cannot relitigate the question of whether or not Bies is mentally retarded.

Additionally, the dissent suggests that there might be some relevant distinction between the "individualized" determination that a particular defendant is mentally retarded and the "categorical" bar on executing mentally retarded persons. However, whatever distinction the dissent is drawing, it is not relevant to *Bies*. The Ohio Supreme

Court determined, in a mitigation proceeding, that Michael Bies is mentally retarded under the clinical definition of that term. Had the identical finding of fact been made in an Atkins hearing, that finding alone would have been sufficient to render Bies ineligible for the death penalty. *See Atkins*, 536 U.S. at 317; *Lott*, 779 N.E.2d at 1014. Regardless of what legal questions were at issue in various proceedings, the question of fact resolved by the Ohio Supreme Court is identical to the one now contested by the state.

B. "Necessary to the Outcome"

Next, the dissent argues that, though Ohio law forbids a state appellate court from affirming a death sentence unless it first determines which mitigating factors are present in the case and weighs those factors de novo against any aggravating factors, *see State v. Jenkins*, 473 N.E.2d 264, 296 (Ohio 1984) (holding that an Ohio appellate court's role in reviewing a death sentence "parallels that of a jury when the sentence of death is imposed"), the Ohio Supreme Court's determination that Michael Bies is mentally retarded was somehow not "necessary" to its decision to affirm Bies' death sentence. If the panel had held otherwise, however, it would have applied a tortured meaning to the word "necessary."

In order to invoke collateral estoppel, an accused must prove, among other things, that resolving the factual issue determined by an earlier proceeding was necessary to the outcome of that proceeding. *N.A.A.C.P.*, 821 F.2d at 330; *see Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or

law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.") To say that X is "necessary" to Y is the same thing as saying that it is impossible for Y to exist unless X also exists. Accordingly, because it is impossible for an Ohio appellate court to affirm a death sentence without first determining which mitigating factors are present in a case, *see Jenkins*, 473 N.E.2d at 296, the Ohio Supreme Court's resolution of the question of whether or not Michael Bies is mentally retarded was necessary to its eventual decision to affirm Bies' death sentence; and the panel committed no error in applying collateral estoppel in Bies.

The dissent claims that collateral estoppel does not apply to the Ohio Supreme Court's determination that Bies is mentally retarded because that finding "cuts against" that court's ultimate conclusion that Bies should be executed. Dissenting Op. at 12. This claim, however, overstates the extent to which the fact that a court's determination was contrary to its ultimate holding precludes the application of collateral estoppel. It is generally the case in the collateral estoppel context that "[a] determination adverse to the winning party does not have preclusive effect." *Fireman's Fund Ins. Co. v. Int'l Market Place*, 773 F.2d 1068, 1069 (9th Cir. 1985). Moreover, as the dissent correctly states, the purpose of this general rule is to protect litigants from being estopped "from relitigating an issue decided in proceedings from which it could not appeal." Dissenting Op. at 12; *see United Aircraft Corp. v. NLRB*, 440 F.2d 85, 99 (2d Cir. 1971); *see also White v. Elrod*, 816 F.2d 1172, 1174 (7th Cir. 1987) ("[W]hen a decision of a tribunal of first

instance is subject to appeal, the decision cannot be given collateral estoppel (or res judicata) effect if the party sought to be bound could not have appealed it, for example because he had won.")

When, however, the party against whom collateral estoppel is asserted was able to challenge the findings reached in the prior proceeding on appeal, courts have held that a finding of fact which is adverse to the party prevailing in that prior proceeding may nonetheless have preclusive effect. *See, e.g., United States v. Weems*, 49 F.3d 528, 533 (9th Cir. 1995); *United Aircraft*, 440 F.2d at 99. Thus in *United States v. Weems*, defendant Clarke Weems used structured funds to purchase two parcels of land,[1] one of which was used for the cultivation of marijuana. 49 F.3d at 530. In a 1990 opinion concerning whether or not the properties were subject to forfeiture, a district court found that Weems was unaware of the marijuana cultivation on his property, but nevertheless held that the properties were subject to forfeiture because they had been purchased with illegally structured funds. *Id.* About fifteen months later, Weems was indicted on three counts of structuring currency transactions, and the trial court permitted the prosecution to introduce evidence that Weems was growing marijuana on his property as evidence of Weems' motive in structuring the transactions. *Id.* After he was convicted, Weems appealed his conviction on collateral estoppel grounds, arguing that the 1990 finding that he was unaware of marijuana

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[1] "Structuring" consists of manipulating transactions with a financial institution with the purpose of evading the reporting requirements governing such institutions. 31 U.S.C. § 5324(a)(3).

cultivation on his property precluded the prosecution from arguing in a successive proceeding that this cultivation motivated his decision to structure funds.

The government argued on appeal that because it was "not entitled to appeal, as of right, the district court's finding [which] was contained in a judgment in the government's favor," that finding should not be given preclusive effect. *Id.* at 533. The Ninth Circuit, however, rejected this argument, explaining that "the government had the opportunity to cross-appeal the court's decision in this case when defendant appealed the forfeiture," and thus *Weems* did not fall within the normal complement of cases where a judgment in favor of the party against whom collateral estoppel is asserted could not have be appealed by that party. *Id.* Under *Weems*, when the fact that a judgment was obtained in a party's favor does not prevent any findings contained in that judgment from being appealed by that party, collateral estoppel may operate against that party with respect to the judgment's findings of fact.

The Second Circuit reached a similar result in *United Aircraft Corp. v. NLRB*. In that case, a union attempted to relitigate the question of whether an employer's unfair labor practice had caused the union to lose majority support among the employer's workers, even though a prior NLRB decision, whose ultimate result was favorable to the union, had found that the employer's unfair labor practices did not result in the union losing its majority. *United Aircraft*, 440 F.2d at 99. Although the finding of fact adverse to the union was contained in a decision favorable to the union, the court held that collateral estoppel prevented the union from relitigating the adverse finding of fact because "the union could have

sought review of the Board's adverse determination on this issue." *Id.* Once again, "the general rule that 'determinations adverse to the winning litigant do not have conclusive effect as collateral estoppel' should not be applied" when the litigant's victory in the prior proceeding did not prevent them from appealing the adverse determination. *Id.* (quoting 1B James William Moore, Federal Practice 3923 (1965)).

Bies v. Bagley fits comfortably within the rule articulated by *Weems* and *United Aircraft*. Michael Bies was convicted and sentenced to death in an Ohio trial court. Bies appealed his sentence to an intermediate appeals court, which found both that Bies is mentally retarded and that he should nonetheless be executed, and he appealed it again to the Ohio Supreme Court, which reached the same conclusion. Thus, although Bies' mental retardation was initially determined in a decision favorable to the government, the government was never prevented from seeking reconsideration of this determination on appeal. Indeed, the final decision to determine that Bies is mentally retarded was issued by the Ohio Supreme Court, which is the court of last resort for all issues of fact raised in Ohio state court. *See* Ohio Rev.Code § 2953.02. Thus, the government had every possible opportunity to appeal the determination that Bies is mentally retarded, and the determination nonetheless survived appellate review. In such circumstances, "the general rule that 'determinations adverse to the winning litigant do not have conclusive effect as collateral estoppel' should not be applied." *United Aircraft*, 440 F.2d at 99 (quoting 1B Moore 3923).

Indeed, the dissent does not contest the existence of the rule described in *Weems* and *United*

Aircraft. Instead, the dissent claims that Bies may not benefit from the collateral estoppel doctrine because the government's victory before the Ohio Supreme Court prevented it from appealing the question of Bies' mental retardation to the United States Supreme Court. Dissenting Op. at 12-13. This claim, however, reflects a misunderstanding of the United States Supreme Court's jurisdiction.

With a few rare exceptions, the Supreme Court's jurisdiction is entirely discretionary, and the Court generally will only exercise its discretion to resolve an "important question of federal law," or to resolve a question federal law which has created confusion amongst the lower courts. *See* Sup. Ct. R. 10 (describing the Supreme Court's "Considerations Governing Review on Certiorari"). The United States Supreme Court does not exercise its jurisdiction to review a state court's finding of fact, especially when multiple state courts have all reached the same factual conclusion. *See, e.g., Oliver v. United States*, 466 U.S. 170, 175 n.4 (1984) ("[W]e do not review here the state courts' finding as a matter of 'fact' that the area searched was not an 'open field.'"); *Page v. Arkansas Natural Gas Corp.*, 286 U.S. 269, 271 (1932) ("Many and complicated questions of fact are involved and were argued here, but, as they have been found in favor of the respondent by both courts below, we do not review them . . . ."); *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246, 261 (1912) ("[I]t is true that upon a writ of error to a state court we do not review findings of fact"). Thus, the dissent's concern—that it is somehow unfair to apply collateral estoppel when the outcome of the Ohio Supreme Court's decision prevented review of a factual conclusion by the United States Supreme Court—is baseless. Regardless of the

outcome of the Ohio Supreme Court's decision, the United States Supreme Court does not review a state court's findings of fact.

IV.

Finally, the dissent claims that the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), requires deference to the state court's opinion denying relief to Bies. Specifically, the dissent alleges that the Supreme Court's cases cut against the decision in *Bies*, and that the panel erred in determining that the state decision denying post-conviction relief to Bies was based on an unreasonable determination of facts.

The dissent is simply wrong in its characterization of Supreme Court precedent; indeed the Supreme Court's decisions in *Ashe*, *Atkins*, and *Sattazahn* compel the result reached by the panel. Ashe held that, under the Double Jeopardy Clause, once "an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. *Atkins* held that a mentally retarded offender may not constitutionally be executed. 536 U.S. at 320. *Sattazahn*, held that a judgment "based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." 537 U.S. at 108 (emphasis removed). In *Bies*, the Ohio Supreme Court determined in a valid and final judgment that Michael Bies is mentally retarded. Because *Atkins* renders a mentally retarded individual ineligible for the death penalty, the determination that Bies is

retarded was a "finding[] sufficient to establish legal entitlement to the life sentence;" and it could not be relitigated in a future proceeding. Any other holding would be contrary to *Ashe*, *Atkins*, and *Sattazahn*.

Moreover, even if these three cases do not compel the result reached in *Bies*, the panel determined that the state decision denying post-conviction relief to Bies was based on an unreasonable determination of the facts. Although the dissent does not contest that the state decision under review made an unreasonable finding of fact, it accuses the panel of failing to "connect [an] allegedly botched fact finding to an established legal doctrine." Dissenting Op. at 13. This is curious accusation, however, because, as the panel opinion explains at great length, *Bies*, 519 F.3d at 333–37, 340–42, the state court's unreasonable finding concerned a factual issue which, according to that very state court, was dispositive of Bies' case.

An Ohio prisoner is ineligible for the death penalty if he is mentally retarded as that term is clinically defined. *See Atkins*, 536 U.S. at 317; *Lott*, 779 N.E.2d at 1014. In determining that Bies is mentally retarded, the Ohio Supreme Court adopted the testimony of Dr. Donna Winter, a clinical psychologist who clinically diagnosed Bies as being mentally retarded. As the panel opinion in *Bies* explains in detail, *Bies*, 519 F.3d at 333–37, 340–42, Dr. Winter applied the appropriate clinical definition of mental retardation when she diagnosed Bies. Yet in the post-conviction proceeding under review in Bies, an Ohio court found that Dr. Winter might have applied some other, nonclinical standard in her diagnosis, and relied on this finding in denying relief to Bies. Indeed, as the Ohio court's opinion makes

clear, the court not only relied on this finding, the finding was the sole basis for the court's decision. According to the Ohio court, *Atkins* and *Lott* "provide the test to determine whether someone is mentally retarded for purposes of the present analysis," but "[t]here is no indication that the [Ohio Supreme] Court applied the analysis now required." (J.A. 1612) This finding of fact made up the sole factual basis of the court's decision to deny relief to Bies under the Double Jeopardy Clause—absent this finding, which the panel determined to be unreasonable, there is no basis whatsoever for the Ohio court's decision.

Furthermore, the Ohio court's unreasonable finding of fact was not only dispositive of its decision, it was hugely relevant to the question of whether Bies is entitled to relief under the collateral estoppel doctrine. As this opinion has already explained, the first prong of the collateral estoppel analysis concerns whether "the precise issue raised in the present case [was] raised and actually litigated in the prior proceeding." *N.A.A.C.P.*, 821 F.2d at 330. Accordingly, when the Ohio court determined that the issue of whether or not Bies is mentally retarded (as that term is clinically defined) was not litigated in the prior proceeding that found him to be mentally retarded, this determination by the Ohio court necessarily foreclosed relief under the collateral estoppel doctrine. When the panel determined the Ohio court's finding to be unreasonable, and thus found that "the precise issue raised in the present case [was] raised and actually litigated in the prior proceeding," it allowed Bies' collateral estoppel claim to move forward. Thus, contrary to the dissent's claim that the panel failed to "connect [an] allegedly botched fact finding to an established legal doctrine," the Ohio court's "botched" finding of fact was

intimately connected to the question of whether Bies may seek relief under the collateral estoppel doctrine.

CONCLUSION

Bies v. Bagley is an easy case. It warrants no further review by the *en banc* Court. As the panel opinion correctly explained, the collateral estoppel doctrine which the Supreme Court articulated in *Ashe v. Swenson* mandates that Michael Bies be granted a writ of habeas corpus. Moreover, even if any uncertainty did exist regarding the proper application of *Ashe*, Bies' case provides an abysmal vehicle to resolve such alleged uncertainty because the Supreme Court's decision in *Sattazahn v. Pennslyvania* provides an alternative grounds upon which Bies is entitled to relief. Thus, despite the dissent's efforts to stir controversy where none exists, the *en banc* Court correctly decided not to subject Bies to further unnecessary litigation.

SUTTON, Circuit Judge, dissenting from the denial of rehearing en banc. Four Article III judges have reviewed this case, and each of them has come to the same conclusion—that the Double Jeopardy Clause bars the State from litigating Bies' eligibility for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). They may be right. I write today, however, simply to point out that there may be another side to the story.

In 1992, Michael Bies and a friend attempted to rape a ten-year-old boy, beat him severely when he resisted, then left him to die. *State v. Bies*, 658 N.E.2d 754, 756–57 (Ohio 1996). An Ohio jury convicted Bies of aggravated murder and three

capital-eligibility specifications. Id. at 758. At trial and on direct appeal, Bies argued that his diminished mental capacity mitigated his culpability for the offense, and each court acknowledged that Bies had "mild mental retardation to borderline mental retardation." *State v. Bies*, No. C-920841, 1994 WL 102196, at *9 (Ohio Ct. App. Mar. 30, 1994) (internal quotation marks omitted); *Bies*, 658 N.E.2d at 761. But in the end the state courts all found that Bies' diminished mental capacity and other mitigating factors did not "outweigh the aggravating circumstances of the murder" and found the death penalty appropriate for the crime. *Bies*, 1994 WL 102196, at *10; *see also Bies*, 658 N.E.2d at 762. Six years after Bies' efforts to overturn his capital sentence on direct review had come to an end, the United States Supreme Court decided *Atkins*, which held that the Eighth (and Fourteenth) Amendment prohibits governments from imposing a capital sentence on individuals suffering from mental retardation, 536 U.S. at 321, and which directed the States to develop appropriate standards for determining whether capital-eligible defendants suffer from mental retardation, *id.* at 317. Soon enough, Bies sought state-court, post-conviction relief on two grounds: that the Eighth Amendment, as construed in *Atkins*, required the State to vacate his capital sentence, and that the Double Jeopardy Clause required the State to vacate his capital sentence in view of the Ohio courts' mitigation determinations that he suffers from mild mental retardation. After the state trial court denied his double-jeopardy claim, but before it had a chance to rule on his *Atkins* claim, Bies moved to amend his then-pending federal habeas petition to include a double-jeopardy claim. The district court permitted the amendment. Then the district court, and later a

panel of this court, held that the Double Jeopardy Clause required the federal courts to vacate Bies' capital sentence and to impose a life sentence instead.

In questioning the panel's approach to this case, let me start by acknowledging that I do not question many of the premises that underlie it. The United States Constitution and Ohio law indeed require the state courts independently to weigh the aggravating circumstances that favor a capital sentence against any mitigating factors, including if appropriate the defendant's mental and psychological profile, before upholding a death sentence. I will accept for the sake of argument that the Ohio courts independently determined that Bies is mentally retarded in upholding his death penalty conviction, even though that is far from clear. *See Bies*, 658 N.E.2d at 761; Bies, 1994 WL 102196, at *9. *Atkins* prevents a State from imposing the death penalty on an individual suffering from mental retardation. And the Double Jeopardy Clause prevents a State from relitigating a criminal defendant's eligibility for the death penalty. *See Bullington v. Missouri*, 451 U.S. 430, 445 (1981).

Yet these legal principles and this finding offer no basis for applying double jeopardy to a state court decision that *affirms* a death sentence. Double jeopardy bars a State from relitigating a defendant's eligibility for capital punishment only when "the sentencing judge or the reviewing court has decided that the prosecution has not proved its case for the death penalty and hence has acquitted petitioners." *Poland v. Arizona*, 476 U.S. 147, 154 (1986) (internal quotation marks and alteration omitted). Or, as the Court has put the point more recently, "the

touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003). But no court in this case ever determined that the prosecution failed to prove its sentencing case: The state courts serially rejected Bies' claims that the death penalty should not be imposed. Put another way—the way the Constitution describes it—Bies was never "twice put in jeopardy," U.S. Const. amend. V, in the post-conviction claim that *he* filed in state court. Quite to the contrary: he was taking a second run at vacating his death sentence—which is assuredly his right but just as assuredly does not offend the double-jeopardy bar.

Poland offers considerable guidance on the point. In *Poland*, the prosecution relied on two aggravating factors: (1) that the defendant expected pecuniary gain from the murder and (2) that the crime was especially heinous, cruel or depraved. 476 U.S. at 149. In imposing the death penalty, the state sentencing court held that the State proved the second aggravating factor but not the first (because the crime was not a contract killing). *Id.* On appeal, the Arizona Supreme Court came to the opposite conclusion on each point, holding (1) that the pecuniary-gain aggravator was not limited to contract killings and (2) that the State had not proved that the second aggravating factor applied. *Id.* at 150. After being retried and sentenced to death again, the defendant appealed to the United States Supreme Court, arguing that his independent acquittals on both aggravating factors taken together barred the State from relitigating his eligibility for the death penalty. The Supreme Court disagreed, holding—in words with direct relevance here—that "[a]ggravating circumstances are not separate

penalties or offenses" upon which jeopardy can attach, but are instead "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment." *Id.* at 156 (internal quotation marks and alterations omitted). Because double jeopardy's concern is the death determination itself, and because no court had held "that the prosecution had failed to prove its case that the petitioners deserved the death penalty," *id.* at 154 (internal quotation marks omitted), the Court held that the State was not barred from relitigating the petitioners' eligibility for it, *id.* at 156–57. What is true of aggravating factors is also true of mitigating factors. The Ohio courts all individually affirmed Bies' capital sentence, and therefore no statement from those courts, whether about aggravating factors or mitigating factors, implicates the double-jeopardy bar.

These principles, it seems to me, suffice to resolve this case. In reaching a different conclusion, the panel (and the concurrence) principally rely on three double-jeopardy decisions—*Ashe v. Swenson*, 397 U.S. 436 (1970), *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), and *Sattazahn*. I am not persuaded. *Ashe* involved two prosecutions, not one, and one acquittal, not none. *See* 397 U.S. at 439–40. In the first prosecution in Ashe, the question was whether the defendant was one of the individuals who had robbed a multi-participant poker game. The jury acquitted the defendant. In the second prosecution, the government charged the same defendant with robbing other participants in the same poker game. The Court barred the second prosecution, holding that the State could not relitigate the defendant's involvement in the robbery because "the single rationally conceivable issue in

dispute before the [first] jury was whether the petitioner had been one of the robbers." *Id.* at 445. *Turner* is of a piece with Ashe, as it involved strikingly similar facts and the same result. *See* 407 U.S. at 368–70 (holding that double jeopardy barred prosecution of the defendant for robbing a poker game participant where the defendant's prior acquittal for being an accessory to the robbery victim's murder necessarily included a finding that he was not present at the time of the robbery). Unlike *Ashe* and *Turner*, however, the State has not reprosecuted Bies after an acquittal, and thus "the controlling constitutional principle" of a "prohibition against multiple trials" has not been offended. *United States v. Wilson*, 420 U.S. 332, 346 (1975). *Ashe* and *Turner*, in short, involved serial prosecutions by the government while this case involves serial efforts by the defendant to vacate his capital sentence.

As the panel reads *Sattazahn*, it establishes that double jeopardy applies "when a judge or jury 'enter[s] findings sufficient to establish legal entitlement to the life sentence,'" *Bies v. Bagley*, 519 F.3d 324, 332 (6th Cir. 2008) (quoting *Sattazahn*, 537 U.S. at 109), whether there has been an acquittal or not. But that is not how I read the case. The rest of the quotation reiterates the time honored precondition that jeopardy does not attach in a sentencing proceeding unless there has been an "acquittal" on the death penalty itself. In full, the Court says that "in *Poland*, unlike in [*Bullington* and *Arizona v. Rumsey*, 467 U.S. 203 (1984)], neither the judge nor the jury had 'acquitted' the defendant in his first capital-sentencing proceeding by entering findings sufficient to establish legal entitlement to the life sentence." *Sattazahn*, 537 U.S. at 108–09.

The holding *for the State* in *Sattazahn* confirms the point—namely, that a hung jury regarding the death penalty did not present a double-jeopardy problem because that "result—or more appropriately, that non-result—cannot fairly be called an acquittal." *Id.* at 109. Because "the touchstone for double-jeopardy protection in capital-sentencing proceedings" remains "whether there has been an 'acquittal,'" and because Bies, like Sattazhan, "cannot establish that the jury or the court 'acquitted' him during his first capitalsentencing proceeding," *id.*, the double-jeopardy bar does not apply.

Besides ignoring the traditional acquittal requirement for invoking the double-jeopardy bar, the panel takes a wrong turn in its application of traditional issue-preclusion principles to this case. Preclusion generally attaches only to questions that were both "*actually* and *necessarily* determined" by "prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added). As to the first requirement, the constitutionality of Bies' death sentence was not "actually . . . determined" by the state courts for this basic reason: saying that Bies suffered from mild mental retardation in considering the mitigating factors that counsel against a death sentence is not the same thing as holding that Bies is ineligible for the death penalty under *Atkins*. Just as the law contains many similar, yet distinct, inquiries for competence—competence to stand trial, competence to waive jury trial rights, competence to represent oneself—so too here. *Cf. Indiana v. Edwards*, 128 S. Ct. 2379 (2008). The mitigation and *Atkins* inquiries flow from different constitutional requirements under the Eighth Amendment—the requirement that capital defendants receive individualized consideration of mitigating factors, *see*

Lockett v. Ohio, 438 U.S. 586, 604–05 (1978), and the categorical (i.e., nonindividualized) requirement that those who are mentally retarded not be executed due to the diminished deterrent value of the death penalty on, and the diminished culpability of, such individuals, *see Atkins*, 536 U.S. at 317–21. But if proof were needed to establish that the Ohio courts did not "actually . . . determine[]" the *Atkins* issue, it ought to suffice to point out that they could not have decided the question: *Atkins* was decided six years *after* the Ohio Supreme Court's opinion.

As to the second requirement, I am hard-pressed to understand how the Ohio courts "necessarily determined" the *Atkins* issue—how in other words they necessarily decided an issue "that did not affect the result" of the state courts' review of Bies' capital sentence. 18 Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction 2d* § 4421 (2008) (emphasis added); *see also NLRB v. Master Slack &/or Master Trousers Corp.*, 773 F.2d 77, 81 (6th Cir. 1985). Unlike *Ashe* and *Turner*, where the precluded issue was necessary to the first judgment, *see Ashe*, 397 U.S. at 445; *Turner*, 407 U.S. at 369, the Ohio courts' mitigation determinations had no bearing on the results of those cases, for the simple reason that they would have affirmed his capital sentence either way—whether he suffered from mental retardation or not. Far from being necessary to the judgment, the Ohio courts' mental-retardation findings cut against it—making them quintessentially the kinds of rulings not eligible for issue-preclusion treatment. *See, e.g., McKinley v. City of Mansfield*, 404 F.3d 418, 429 (6th Cir. 2005); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457–58 (2d Cir. 1995); *Balcom v. Lynn Ladder & Scaffolding Co., Inc.*, 806 F.2d 1127, 1127–28 (1st Cir. 1986); *see also*

18 Wright et al., *supra*, § 4421 (explaining that the classic example of issues not necessary to the judgment are those that are contrary to the ultimate result, such as jury findings of negligence where the defendant wins on contributory-negligence grounds).

The effect of the panel's decision is to say that the State lost this criminal case by winning it. Yet issue preclusion generally does not bar the State (or any party) from relitigating an issue decided in proceedings from which it could not appeal. *See* 18 Wright et al., *supra*, § 4421; *see also Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1204–05 n.7 (1st Cir. 1993); *White v. Elrod*, 816 F.2d 1172, 1174 (7th Cir. 1987). But the panel opinion does just that. As a mitigating factor that the state courts had to weigh *against* the aggravating factors, a finding of Bies' mental retardation was an obstacle to the judgment entered rather than a necessary step toward it. Having won the case in the state courts, Ohio of course had no reason to seek review in the United States Supreme Court (even had *Atkins* already been decided), and Bies will search in vain for a case in which that Court accepted review of a State's appeal from a victory. I know of no case in which any court applied the double-jeopardy bar to invalidate a decision that the State (or United States) had won.

The panel's only argument that Bies' mental capacity was necessary to the state courts' judgments is that the courts had a "duty to examine the entirety of the facts available to the jury and weigh them against the aggravating factors proven at trial." *Bies*, 519 F.3d at 338. But the fact that the state courts had to consider (or even to decide) Bies' mental capacity does not mean that the determination they reached was necessary to the *outcome* of the decision.

Because any state court finding that Bies was mentally retarded was in no sense "necessarily determined" by the prior judgment, *Montana*, 440 U.S. at 153, and because no court has ever held that the prosecution "failed to prove its case that [Bies] deserved the death penalty," *Poland*, 476 U.S. at 154 (internal quotation marks omitted), neither issue preclusion nor double jeopardy bars relitigation of the issue.

All of this would be true even if AEDPA did not apply. But of course AEDPA does govern this case, and, as I have shown, the only Supreme Court decisions bearing on this case all cut against the panel's decision. It is true, as Bies and the panel point out, that AEDPA permits a federal court to grant habeas relief solely on the ground that the state courts made unreasonable findings of fact. And it is true that the panel rested its AEDPA analysis on the view that the state trial court, in ruling on Bies' double-jeopardy claim, unreasonably questioned whether the Ohio Supreme Court relied on the same standard for assessing mental retardation in conducting its direct review of Bies' sentence that was later adopted as "a standard for evaluating an individual's claim of mental retardation" under *Atkins* in *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002). *See Bies*, 519 F.3d at 340–42. But this does not satisfy AEDPA, even if I accept for the sake of argument that the state trial court's finding was unreasonable. A federal court cannot simply identify an unreasonable fact finding, then conclude that AEDPA has been satisfied. It must connect that allegedly botched finding to an established legal doctrine. Here there are a series of *legal* hurdles that Bies must clear before this alleged fact question has any bearing on this case: Does the

Double Jeopardy Clause apply without an acquittal? Do issue-preclusion principles apply when the issue purportedly decided in the earlier case was not actually or necessarily decided in that case? Because Bies cannot satisfy these requirements under established law, much less under AEDPA, his fact-finding argument simply chases the tail of identifying a cognizable theory of relief.

* * *

What is most trying about all of this is that it does not seem necessary. When the federal courts first acted in this case, they interrupted a state trial court proceeding designed to determine whether Bies had a successful *Atkins* claim. The whole point of the double-jeopardy argument was to stop the state court proceeding in its tracks and to prevent the same courts from opining about the validity of his *Atkins* claim. In obliging Bies, however, we have failed to give the state courts a chance to bring their judgment to bear on the point, and after this decision federal district courts within the circuit presumably will do the same thing with other similarly situated *Atkins* cases. *See State v. Hill*, No. 2006-T-0039, 2008 WL 2719570, at *6 (Ohio Ct. App. July 11, 2008) (disagreeing with *Bies* and holding "that the issue of Hill's mental retardation was not 'actually and directly litigated' at his sentencing hearing"). AEDPA's exhaustion requirement exists to prevent just this kind of premature intervention while a State addresses the petitioner's challenge. *See Turner v. Bagley*, 401 F.3d 718, 724 (6th Cir. 2005). And unlike cases where we have permitted unexhausted double-jeopardy challenges before the defendant's *second prosecution* commenced, *see Gully v. Kunzman*, 592 F.2d 283, 286 (6th Cir. 1979), Bies

faces no risk of a second prosecution.

By contrast, were we to allow the state court proceeding to go forward, Bies is hardly in a disadvantaged position. He has an IQ of 69, and two licensed clinical psychologists have concluded that he is mildly mentally retarded. Assuming that these opinions stem from balanced evaluations of Bies' mental capacity, there is ample reason to think that the Ohio courts will take his claim seriously. *Atkins*, like Bies, was mildly mentally retarded, Atkins, 536 U.S. at 308–09, and Bies' IQ places him within the category of individuals the Court recognized might be affected by its decision, *see id.* at 316 (noting that the practice of executing mentally retarded individuals has become "truly unusual" given that "only five [States] have executed offenders possessing a known IQ less than 70" since the Court last ruled on the question).

Nor have the Ohio courts been reluctant to grant relief under *Atkins*. The Ohio Supreme Court already has granted relief in one such case, *State v. White*, 885 N.E.2d 905, 917 (Ohio 2008), and the state trial courts have done the same in six others, *see* Karen Farkas, *Ruling on Mental Retardation Takes 6 Off Ohio's Death Row*, Cleveland Plain Dealer, May 12, 2008, at B1. And even if the worst should happen from Bies' perspective, even if the Ohio courts should conclude that Bies was not mentally retarded under *Atkins*, he could seek certiorari on the question or seek habeas relief in the district court. Far from undermining *Atkins*, this path (through state court determinations) is exactly what the Supreme Court envisioned: For *Atkins* left "to the States the task of developing appropriate ways to enforce the constitutional restriction," *id.* at

317 (internal quotation marks and alteration omitted), and principles of comity and federalism mandate that we give the Ohio courts the first opportunity to apply that restriction to Bies' case.

I respectfully dissent from the court's denial of rehearing en banc.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 08a0095p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BIES,
Petitioner-Appellee,

v.

MARGARET BAGLEY, Warden
Respondent-Appellant,

No. 06-3471

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 00-00682—Susan J. Dlott, District Judge

Argued: October 31, 2007

Decided and Filed: February 27, 2008

Before: DAUGHTREY, MOORE, and CLAY,
Circuit Judges.

COUNSEL

ARGUED: Carol Ann Ellensohn, ATTORNEY GENERAL'S OFFICE OF OHIO, Columbus, Ohio, for Appellant. Randall L. Porter, PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellee. **ON BRIEF:** Carol Ann Ellensohn, Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, Columbus, Ohio, for Appellant. Randall L. Porter, PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, S. Scott Haynes, Reynoldsburg, Ohio, for Appellee.

OPINION

CLAY, Circuit Judge. Respondent Margaret Bagley, warden of the prison where Petitioner Michael Bies is incarcerated, appeals the order of the district court granting Petitioner a writ of habeas corpus pursuant to 28 U.S.C. § 2254, vacating his sentence of death, and ordering that he be resentenced to receive a sentence other than death. Respondent claims that, even though Petitioner was found to be mentally retarded on direct appeal, Ohio should be permitted to relitigate this finding now that it has taken on new legal significance in light of the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). For the reasons which follow, we hold that Respondent's claim is precluded by the Double Jeopardy Clause of the Constitution, and **AFFIRM** the decision of the district court granting habeas relief to Petitioner.

STATEMENT OF FACTS

A. Trial and Direct Appeals

On October 13, 1992, Petitioner Michael Bies was found guilty, by an Ohio state court jury, of the kidnapping, attempted rape and murder of ten-year-old Aaron Raines. During the sentencing phase of his trial, Petitioner introduced the testimony of Dr. Donna Winter, a licensed clinical psychologist, who testified both that Petitioner has an IQ of 69, and that he possesses all the traits necessary for a clinical diagnosis of mental retardation. Dr. Winter's testimony was corroborated by a September 11, 1992 letter from Dr. Myron S. Fridman, another licensed clinical psychologist who diagnosed Petitioner as a "marginally functioning, mildly mentally retarded man . . . ." (J.A. 1501) Nevertheless, the jury recommended the death sentence, and on October 30, 1992, the trial court accepted this recommendation.[1]

Petitioner appealed both his conviction and his death sentence to the Ohio Court of Appeals. On appeal, Petitioner argued that he is mentally retarded, and that this mental retardation was a mitigating factor which should permit him to receive a sentence other than death. In response to these arguments, the government questioned Petitioner's assertion that he is "supposedly retarded," and cited specific evidence in the record which, it claimed, indicates that Petitioner does not suffer from mental retardation. (J.A. 789-90)

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[1] While not at issue in this appeal, Bies also was also sentenced to eight to fifteen actual years on the attempted rape count, and ten to twenty-five actual years on the kidnapping count.

While the appeals court affirmed both Petitioner's conviction and his death sentence, *State v. Bies*, No. C-920841, 1994 WL 102196 at *10 (Ohio Ct. App. March 30, 1994), it also sided with Petitioner on the question of his mental retardation. According to the appeals court, Petitioner has "exhibited developmental delays from birth," and "he has been in special-education classes since kindergarten . . . ." *Id.* at *9. It concluded that Petitioner suffered from "mild mental retardation to borderline mental retardation," as well as "probable organic brain dysfunction characterized by specific learning disabilities." *Id.*

Petitioner appealed this decision to the Supreme Court of Ohio, where the issue of his mental retardation was again litigated. Once again, Petitioner argued that he is mentally retarded, and that this mental retardation is a mitigating factor which should lead to a sentence other than death. Once again, the government contested Petitioner's claim that he is "supposedly retarded," and once again, the government cited evidence in the record which suggests that Petitioner does not suffer from mental retardation. (J.A. 830-31) The state supreme court affirmed Petitioner's conviction and death sentence. *State v. Bies*, 658 N.E.2d 754, 762 (Ohio 1996). On the issue of mental retardation, however, the court sided with Petitioner, crediting Dr. Winter's diagnosis of Petitioner as mentally retarded. *Id.* at 761.

On September 20, 1996, Petitioner filed an "Application for Reopening" in the Ohio Court of Appeals under an Ohio appellate rule which allows a criminal defendant to claim ineffective assistance of appellate counsel. Ohio App. R. 26(B)(1). The court of

appeals denied this application, and the Supreme Court of Ohio affirmed, holding that Petitioner "offered no compelling justification" for granting his application, and noting that the application was filed outside of the ninety day deadline imposed by the Ohio rules. *State v. Bies*, 680 N.E.2d 975, 975 (Ohio 1997).

B. State Post-Conviction Proceedings

Also on September 20, 1996, Petitioner filed a petition seeking post-conviction review of his conviction and death sentence in Ohio state court. Among several claims for relief, Petitioner again argued that he is mentally retarded, and that executing him would violate the Eighth Amendment because "a national consensus against executing the mentally retarded reflects the new standard of decency in the United States." (J.A. 840) While the government contested Petitioner's Eighth Amendment claim, this time it conceded that "[t]he record reveals defendant to be mildly mentally retarded with an I.Q. of about 69." Although the trial court held that mentally retarded individuals could be executed, it also found that "[t]he defendant is shown by the record to be mildly mentally retarded . . . ." (J.A. 881)[2]

While a second, unsuccessful petition for state post-conviction relief was being heard by the Ohio courts, the United States Supreme Court held in *Atkins v. Virginia*, that "death is not a suitable

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[2] On appeal, the Ohio Court of Appeals did not reach Petitioner's Eighth Amendment claim on the grounds that it was not properly raised on direct appeal. The Supreme Court of Ohio subsequently denied review of this decision.

punishment for a mentally retarded criminal." 536 U.S. at 321. Petitioner followed this decision with a May 2, 2003 petition seeking post-conviction relief in Ohio state court, this time claiming that he could not be executed under Atkins, and that the government is estopped from contesting the fact of his mental retardation inasmuch as this fact had already been determined by prior state court proceedings. Despite this estoppel argument and the government's concession in an earlier proceeding that Petitioner is mentally retarded, the government contested Petitioner's *Atkins* claim on the grounds that Petitioner "is not mentally retarded." (J.A. 1593)

Petitioner moved for summary judgment on his estoppel claim, and this motion was denied in an April 5, 2004 order by an Ohio trial judge. Noting that this order made no mention of the Double Jeopardy Clause, Petitioner then filed a Renewed Motion for Summary Judgment, arguing that "the Double Jeopardy Clause bars the prosecutor from relitigating the mental health findings" of the Ohio courts. (J.A. 1618) The state trial court denied this renewed motion on June 21, 2004 without providing any additional reasoning with respect to Petitioner's double jeopardy claim.

C. Federal Habeas Proceedings

The case on appeal to this Court was initially filed on August 21, 2000 in the Southern District of Ohio. This federal habeas petition was pending before the district court when the Supreme Court decided *Atkins*, and Petitioner filed a Motion for Summary Judgment shortly after *Atkins* was handed down. On January 31, 2003, the district court denied this motion on the grounds that Petitioner had not

yet exhausted his *Atkins* claim in state court. Nevertheless, the district court retained jurisdiction over Bies' petition, and issued a stay of execution on July 30, 2003.

Petitioner's double jeopardy claim was first raised in Ohio state court. After the state trial court denied him summary judgment on this issue, Petitioner moved the district court to amend his federal habeas petition to include this claim. Although the government filed a memorandum in opposition to this motion, the district court granted Petitioner leave to amend his claim on April 11, 2005, and proposed that this double jeopardy claim be severed or bifurcated to allow it to be resolved independent of the balance of the habeas petition. After briefing on this issue of severance or bifurcation, the district court did bifurcate the claims to allow Petitioner's double jeopardy claim to proceed separately, and granted the petition for a writ of habeas corpus on March 1, 2006 as to this double jeopardy claim. This appeal followed.

DISCUSSION

Standard of Review

This Court reviews the district court's disposition of a petition for writ of habeas corpus *de novo*, and its factual findings for clear error. *Smith v. Hofbauer*, 312 F.3d 809, 813 (6th Cir. 2002).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides federal habeas relief for a state court defendant if the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court[,]" 28 U.S.C. § 2254(d)(1), or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). We hold that this AEDPA standard should be applied here.[3] A state court adjudication is "contrary to" Supreme Court precedent under §2254(d)(1), "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). A state court adjudication "involves 'an unreasonable application of' Supreme Court precedent under § 2254(d)(2), 'if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case,' or if the court unreasonably refuses to extend, or unreasonably extends, existing legal principles from the Court's precedents to a new context." *Hofbauer*, 312 F.3d at 813 (quoting *Taylor*,

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[3] Petitioner argues that "when reviewing pretrial claims of double jeopardy, this Court applies the standard of review contained in 28 U.S.C. § 2241," and urges us to apply § 2241's less restrictive standard to this case. (Petitioner's Br. at 21) To support this claim, however, he relies on this Court's decision in *Moyer v. Petty*, No. 86-3243, 1986 WL 18526 (6th Cir. Dec. 23, 1986), which held that § 2254 "applies only in post-trial situations to petitioners in custody 'pursuant to the judgment of a state court.'" *Id.* at *2 (quoting 28 U.S.C. § 2254(b) (1982)); *accord Stow v. Murashige*, 389 F.3d 880, 886 (9th Cir. 2004); *Jacobs v. McCaughtry*, 251 F.3d 596, 597 (7th Cir. 2001); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998). Because Petitioner is imprisoned pursuant to such a judgment, § 2254(d) contains the proper standard of review to be applied here.

529 U.S. at 1520).

I. EXHAUSTION OF PETITIONER'S STATE COURT REMEDIES

In most cases, a habeas petitioner must "exhaust[ ] the remedies available in the courts of the State" before seeking relief in federal court. § 2254(b)(1)(A). This rule does not apply, however, when "there is an absence of available State corrective process," or when "circumstances exist that render such process ineffective to protect the rights of the applicant." § 2254(b)(1)(B). In *Gully v. Kunzman*, 592 F.2d 283 (6th Cir. 1979), this Court held that just such circumstances exist when a defendant raises a double jeopardy claim on habeas review.[4] *Id.* at 286.

Like the instant case, *Gully* involved federal habeas petitioners who claimed, under various constitutional theories, that they could not be sentenced to death. *Id.* at 286. Among these claims, the *Gully* petitioners argued that, because they were sentenced to life in prison under a prior state proceeding, the Double Jeopardy Clause forbade the state from retrying and sentencing them to death. Id. Although we held that the *Gully* petitioners' non-

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[4] Although Gully was decided pre-AEDPA, it has been applied by this Court in post-AEDPA decisions. *See, e.g., Harpster v. Ohio*, 128 F.3d 322, 325-26 (6th Cir. 1997) ("[F]ederal adjudication of double jeopardy claims raised on pre-trial petitions for habeas corpus is appropriate when those claims have been raised and rejected in the state trial court and under state law there is no right to interlocutory appeal." (citing *Gully*, 592 F.2d at 287)). AEDPA made no substantive edits to § 2254(b), which was interpreted in *Gully*. Compare 28 U.S.C. § 2254(b) (1988) *with* 28 U.S.C. § 2254 (b) (2000).

double jeopardy claims must be fully exhausted in state court prior to federal habeas review, we also held that a more permissive exhaustion rule applies to double jeopardy claims. *Id.*

According to *Gully*, the Double Jeopardy Clause protects, not only against "the ultimate legal consequences of (an adverse) verdict," but also against the mere "risk or hazard" of twice defending against the same claim. *Id.* at 287 (quoting *Price v. Georgia*, 398 U.S. 323, 331 (1970)). "The 'prohibition is not against being twice punished, but against being twice put in jeopardy.'" *Id.* (quoting *Ball v. United States*, 163 U.S. 662, 669 (1896)). Because of the prohibition against a defendant being required to relitigate a previously decided matter, "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge . . . must be reviewable before the subsequent exposure occurs." *Harpster*, 128 F.3d at 325 (quoting *Abney v. United States*, 431 U.S. 651, 662 (1977)).

Under *Gully*, a federal court may provide habeas review of double jeopardy claims once "the defendant has exhausted whatever procedures are available to him under state law for 'pre-exposure' vindication of his rights." 592 F.2d at 287; *see also Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 303 (1984) ("[A] requirement that a defendant run the entire gamut of state procedures, including retrial, prior to consideration of his claim in federal court, would require him to sacrifice one of the protections of the Double Jeopardy Clause."). In the instant case, however, Petitioner has exhausted these procedures.

Petitioner challenged his death sentence in a post-conviction proceeding in Ohio state court, claiming both that it would violate the Double Jeopardy Clause for the state to relitigate his mental retardation, and, in the alternative, that the trial court should again find him mentally retarded and therefore ineligible for execution. When Petitioner sought summary judgment on the double jeopardy claim, however, the trial judge denied his motion. Under Ohio law, "the proper remedy for seeking judicial review of the denial of a motion to dismiss on the ground of double jeopardy is a direct appeal to the court of appeals at the conclusion of the trial court proceedings." *Wenzel v. Enright*, 623 N.E.2d 69, 71 (Ohio 1993). Therefore, the only way for Petitioner to challenge the denial of his double jeopardy claim is for him to proceed to a full trial on the merits regarding his petition for post-conviction review. Such a trial, however, would force Petitioner to once again litigate the question of his mental retardation, a procedure which itself violates the Double Jeopardy Clause. *See Lydon*, 466 U.S. at 303 ("[A] requirement that a defendant run the entire gamut of state procedures, including retrial . . . would require him to sacrifice one of the protections of the Double Jeopardy Clause."); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) ("[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.").

In order to avoid unconstitutionally requiring Petitioner to relitigate the issue of his mental retardation, we hold that Petitioner has "exhausted whatever procedures are available to him under state law for 'pre-exposure' vindication of his rights."

Gully, 592 F.2d at 287. The government cites no double jeopardy cases which would suggest a contrary holding, instead relying on this Court's decision in *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). In *Hill*, we held that a habeas petition seeking to vacate an allegedly mentally retarded inmate's death sentence on Eighth Amendment grounds must first be litigated in state court. *Id.* at 683. *Hill* is inapposite, however, because the petitioner in that case did not raise a double jeopardy claim. *Id.* at 680. As we held in *Gully*, a habeas petitioner may proceed to raise a double jeopardy claim in federal court even if the petitioner also presents additional claims which must be further litigated in state court. *See* 592 F.2d at 287.

Petitioner raised a double jeopardy claim in his habeas petition, arguing that the state may not relitigate the issue of his mental retardation. He filed a motion seeking summary judgment on this claim, and this motion was denied by the state trial court. Furthermore, Ohio law prevents Petitioner from appealing this denial until after a full trial on the question of his mental retardation. *Wenzel*, 623 N.E.2d at 71. Such a trial, however, would deprive Petitioner of the very same double jeopardy right he asserted in his motion for summary judgment. We therefore hold that, under our decision in *Gully*, Petitioner has exhausted his state court remedies with respect to his double jeopardy claim, and may seek relief in federal court. 592 F.2d at 287. We now turn to the merits of his petition.

II. APPLICATION OF THE DOUBLE JEOPARDY CLAUSE TO PETITIONER'S MENTAL RETARDATION CLAIM

The Double Jeopardy Clause applies not just to criminal convictions, but also to sentencing proceedings in capital cases. *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *See Bullington v. Missouri*, 451 U.S. 430, 445 (1981) ("The embarrassment, expense and ordeal and the anxiety and insecurity faced by a defendant at the penalty phase of a . . . capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." (internal quotations omitted)). In the context of a capital sentence, a criminal defendant is protected against double jeopardy when a judge or jury "enter[s] findings sufficient to establish legal entitlement to the life sentence" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003).[5] Furthermore, in *Ashe v. Swenson*, the Supreme Court held that, under the Double Jeopardy Clause, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. Taken together, these clearly established principles of federal law prohibit the State of Ohio from relitigating the issue of Petitioner's mental

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[5] Although *Sattazahn* held that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal,'" 537 U.S. at 109, the word "acquittal" in this context should not be read to mean that the defendant emerges victorious from the guilt phase of a criminal trial. Rather, "acquittal," for the purpose of the Double Jeopardy Clause in capital sentencing cases occurs when a judge or jury "enter[] findings sufficient to establish legal entitlement to the life sentence." Id.

retardation.

A. Collateral Estoppel

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under *Ashe* this "established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy." 397 U.S. at 445. Moreover, in the double jeopardy context, collateral estoppel provides an absolute and mandatory bar to the relitigation of certain issues by a state party; "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.

In the context of civil litigation, this court applies a four-part test in determining whether collateral estoppel precludes relitigation of an issue. Under that test, "Before collateral estoppel may be applied to bar litigation of an issue, four specific requirements must be met:"

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the

issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328, 330 (6th Cir. 1987) (footnotes omitted). While this Court has not yet had the opportunity to determine whether the same test applies in the double jeopardy context, this four-part test fully implements the Fifth Amendment's requirement that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443; *see United States v. Fiel*, 35 F.3d 997, 1006 (4th Cir. 1994) (applying a similar test under *Ashe*). We therefore consider each of these four-parts in turn.

1. The Issue Being Relitigated

To succeed in his double jeopardy claim, Petitioner has the burden of demonstrating that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 493 U.S. 342, 350 (1990). The government argues that Petitioner has not met his burden because, even though the Supreme Court of Ohio found that Petitioner is mentally retarded on direct appeal of his death sentence, "there was no definition of mental retardation for the purposes of the Eighth Amendment," at the time of this decision. (Reply Br. at 1) According to the government, Petitioner can only establish his mental retardation for Eighth Amendment purposes by demonstrating in a post-conviction proceeding that he is mentally retarded under the standard described in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002).

In *Lott*, the Supreme Court of Ohio described the test Ohio courts use for determining whether a person is mentally retarded and therefore ineligible for the death penalty under *Atkins*. *Id.* at 1014. This decision was necessary because, although *Atkins* held that the mentally retarded could not be executed, it simultaneously "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The government contends that, because Petitioner's direct appeals were decided before *Atkins* and *Lott*, the courts hearing those appeals could not have applied the same standard articulated in *Lott* to determine that Petitioner is mentally retarded. The record reveals otherwise.

Although *Atkins* did not mandate that states follow a specific procedure in determining whether or not a capital defendant is mentally retarded, it cited favorably to the clinical definition of mental retardation established by the American Association on Mental Retardation and the American Psychiatric Association. *Id.* at 309 n.3. Under that definition:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

Id. (quoting *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed.2000) ("DSM-IV")).

In *Lott*, the court held that Ohio courts should apply this clinical standard in determining whether a capital defendant is mentally retarded. *See* 779 N.E.2d at 1014 ("Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation."). While the government conceded at oral argument that *Lott* does nothing more than restate the clinical definition of mental retardation, it also claims in its brief that this established a new rule in Ohio. Neither past Ohio decisions nor the record in this case support that claim. Prior to *Lott*, Ohio courts judging whether an individual is mentally retarded often relied on the clinical definition of mental retardation. *See, e.g., State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) (crediting the diagnosis of a clinical psychologist in determining that a capital defendant is mentally retarded);. *State v. Trent*, No. 17705, 1999 WL 1243352 at *2 (Ohio Ct. App. December 23, 1999) (unpublished decision) (describing an individual as mentally retarded because he fit the clinical definition under the DSM-IV). Moreover, the record in this case indicates that the state supreme court applied the same clinical definition of mental retardation in its determination that Petitioner is mentally retarded as it did in deciding *Lott*.[6]

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[6] The fact that Petitioner was determined to be mentally retarded by the Supreme Court of Ohio on appeal, rather than by the trial court, makes no difference to this Court's consideration of this case. In Sattazahn, the Supreme Court held that double jeopardy attaches when a judge or jury "enter findings sufficient to establish legal entitlement to the life

sentence." 537 U.S. at 109. Under Ohio law, a state appeals court reviewing a death sentence must conduct an independent review of the aggravating circumstances and mitigating factors relevant to the sentence on review. Bies, 658 N.E.2d at 761. Pursuant to this duty, the state supreme court made a finding that Petitioner is mentally retarded. As this finding is sufficient to establish [Petitioner's] legal entitlement to a life sentence, Atkins, 536 U.S. at 321, the fact that it was made by judges rather than a jury is irrelevant to our inquiry. See Sattazahn, 537 U.S. at 108.

This view is bolstered by the Supreme Court's decision in *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988), which held that "[b]ecause the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court should have entered a judgment of acquittal." *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988). To distinguish between trial and appellate in such cases would "'create a purely arbitrary distinction' between defendants based on the hierarchical level at which the determination was made." *Id.* (quoting *Burks v. United States*, 437 U.S. at 1, 11 (1978)).

A finding of fact which renders a defendant constitutionally ineligible for the death penalty requires a court to enter a judgment of "acquittal" for double jeopardy purposes. *Sattazahn*, 537 U.S. at 109; see supra note 5. In the instant case, the state supreme court made just such a finding. *Bies*, 658 N.E.2d at 761. We would create a "purely arbitrary distinction" by penalizing Petitioner simply because the finding of fact which requires a judgment of acquittal was made not by a trial judge, but by his or her judicial superiors. *Lockhart*, 488 U.S. at 39; *see also Cabana v. Bullock*, 474 U.S. 376, 387 (1986) *overturned on other grounds by Pope v. Illinois*, 481 U.S. 497, 503 n. 7(1987) ("[T]he court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite

The Supreme Court of Ohio's finding that Petitioner is mentally retarded was based solely on the diagnosis of Dr. Donna Winter, a licensed clinical psychologist. *Bies*, 658 N.E.2d at 761. Furthermore, it is clear from Dr. Winter's testimony at Petitioner's trial that she applied the same clinical method of diagnosing mental retardation which was described by the court in *Lott*. According to *Lott*, a person must display three traits in order to be diagnosed with mental retardation: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." 779 N.E.2d at 1014; see also DSM-IV 41 (describing the same test).[7] Other adaptive skills listed by the clinical definition of mental retardation include "home living, social/interpersonal skills, use of community resources . . . functional academic skills, work, leisure, health, and safety." *Atkins*, 536 U.S. at 317 (quoting DSM-IV 41). In testifying as to Petitioner's mental retardation, Dr. Winter found each of the three traits required for a diagnosis of mental retardation present in Petitioner.

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factual finding as to the defendant's culpability has been made.")

[7] Admittedly, the DSM-IV was published two years after Dr. Winter's diagnosis of Petitioner. Even so, the definition of mental retardation described by Lott was recognized as the clinical standard at least five years prior to Dr. Winter's testimony. *See Diagnostic and Statistical Manual of Mental Disorders* 28 (3d ed.1987) ("DSM-III") ("The essential features of [mental retardation] are: (1) significantly subaverage general intellectual functioning, accompanied by (2) significant deficits or impairments in adaptive functioning, with (3) onset before the age of 18.").

The first criteria for a diagnosis of mental retardation is "significantly subaverage intellectual functioning." DSM-IV 49. This prong is established by "an IQ of approximately 70 or below on an individually administered IQ test." *Id.* Dr. Winter testified that Petitioner has an IQ of 69. Similarly, Dr. Winter testified that Petitioner has significant limitations in several adaptive skills. Dr. Winter testified as to Petitioner's limited functional academic skills, noting that he is unable to read, that he suffers from "developmental academic disorder," and that he functions at a "third to sixth grade level." (J.A. 1166, 1168) Dr. Winter testified that Petitioner has significant limitations to his ability to communicate, noting that he had "problems with language at a very early age" (J.A. 1209) Dr. Winter testified that Petitioner has significant limitations to his social and interpersonal skills, noting that he was "violent and uncontrollable" at a very young age, (J.A. 1159), that he was expelled from public school for his disruptive and often violent behavior, and that he was transferred to a "severe behavior handicap class." (J.A. 1163) Finally, Dr. Winter testified that Petitioner has significant limitations to his ability to care for himself, noting that he had made a number of suicide attempts by the age of 13. Finally, Dr. Winter testified that Petitioner's limitations began to manifest as early as age 3, thus establishing their onset before the age of 18.

Based on Dr. Winter's testimony—the testimony of a clinical psychologist—it is clear that she relied on the clinical definition of mental retardation in diagnosing Petitioner. Because the Supreme Court of Ohio held that Dr. Winter's testimony was alone sufficient to establish Petitioner's mental retardation, *Bies*, 658 N.E.2d at

761, it is equally clear that the state supreme court found Petitioner to be mentally retarded under the clinical definition of that mental disorder. Accordingly, we conclude that the Supreme Court of Ohio's post-*Atkins* decision in *Lott* did not establish a new method of determining mental retardation for purposes of the Eighth Amendment. Rather, *Lott* simply restated the same diagnostic method the Supreme Court of Ohio applied to the Petitioner on direct appeal. Therefore, we hold that "the precise issue raised in the present case [was] raised and actually litigated in the prior proceeding." *N.A.A.C.P.*, 821 F.2d at 330.

Inasmuch as the precise issue litigated on direct appeal is now being raised again by the government, we conclude that the first prong of the collateral estoppel test has been met. *Id.*

2. The Necessity of the State Supreme Court's Finding

The second prong of the four-part collateral estoppel test requires that determination of the issue being relitigated "must have been necessary to the outcome of the prior proceeding." *Id.* We believe that this prong has also been established here.

Under Ohio law, a sentencing court may not impose the death penalty unless that court has first considered any mitigating factors weighing against a death sentence, Ohio Rev. Code § 2929.04(C), and found those mitigating factors proven by a preponderance of the evidence. *State v. Jenkins*, 473 N.E.2d 264, 275 (Ohio 1984); *see also Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (holding that a jury may not sentence a mentally retarded defendant

to death unless it has been allowed to consider the defendant's mental retardation at sentencing). Furthermore, as the Supreme Court of Ohio expressly acknowledged in Petitioner's direct appeal, an Ohio court reviewing a death sentence must engage in an independent review of the aggravating circumstances and mitigating factors relevant to the sentence on review. *Bies*, 658 N.E.2d at 761.

When reviewing a sentence of death, "the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case." Ohio Rev. Code § 2929.05(A). This independent review of the aggravating circumstances and mitigating factors is far more rigorous than the deferential standard of review which appellate courts normally apply to findings of fact by a trial court—even amounting to *de novo* review on both issues of law and issues of fact. *See State v. Holloway*, 527 N.E.2d 831, 837 (Ohio 1988) ("[T]hree opportunities are provided defendants to argue the appropriateness of a sentence less than death to courts which must decide the question *de novo*.") Indeed, the Supreme Court of Ohio's reconsideration of the mitigating factors weighing against a death sentence "parallels that of a jury when the sentence of death is imposed . . . ." *Jenkins*, 473 N.E.2d at 306.

An Ohio appellate court's review of a death sentence is not only rigorous, it is sweeping. During the sentencing phase of a capital defendant's trial, an Ohio jury may not limit its inquiry to considering only those mitigating factors the defendant argues

are present in his or her case. Rather, "Ohio law provides that the jury is required to consider as possible mitigating factors the nature and circumstances of the offense; the history, character, and background of the defendant; and any other factors that call for a penalty less than death or that lessen the appropriateness of the death penalty." *State v. Jordan*, 804 N.E.2d 1, 16 (Ohio 2004). Each of these factors—including the all-encompassing inquiry into "any other factors that call for a penalty less than death or that lessen the appropriateness of the death penalty"—must be considered by the jury even if they are not raised by the defendant at trial. *See id.* (holding that a trial judge properly instructed a jury that it "must consider" each of the mitigating factors described by statute before imposing the death penalty).

Moreover, in considering these factors, the jury is not limited to finding mitigating factors present in the evidence presented during a capital defendant's mitigation case. Instead, the jury must consider "any evidence" which leads to a conclusion that "any factors in mitigation of the imposition of the sentence of death" are present in the defendant's case. *Id.*; *see also State v. Ashworth*, 706 N.E.2d 1231, 1239–40 (Ohio 1999) (holding that a defendant who presents no mitigating evidence to counterbalance aggravating circumstances may still receive a sentence other than death). In other words, before a capital defendant may be sentenced to death, a jury must first examine the entirety of the evidence in the case, and ask whether any parts of that evidence combine to outweigh the prosecution's case for imposing the death penalty. Because an Ohio appellate court's review of a death sentence "parallels that of a jury when the sentence of death is

imposed," this far-reaching inquiry must be conducted *de novo* on appeal. *Jenkins*, 473 N.E.2d at 306.

Due to the broad inquiry an Ohio court must perform before sentencing a person to death, it would be impossible for that court to simply assume without deciding that a particular mitigating factor exists, and then argue that the death penalty may still be imposed because the aggravating circumstances outweigh that factor. Ohio law does not limit a court's task in imposing the death penalty to simply proving that the mitigating factors proffered by the defendant are insufficient to overcome the prosecutor's evidence. *Jordan*, 804 N.E.2d at 16. Rather, because a sentencing court's inquiry is open-ended, determining which mitigating factors are actually present in a case is a necessary first step to determining whether those factors outweigh the aggravating circumstances.[8]

Indeed the Supreme Court of Ohio engaged in just such an inquiry before upholding Petitioner's death sentence. In addition to determining that Petitioner is mentally retarded, the court found numerous other mitigating factors in the evidence presented to the jury at trial. The court found that the fact that Petitioner's "father was an alcoholic

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[8] This reading of Ohio law is bolstered by the plain language of the state's death penalty statute, which requires a sentencing court to ask whether the "aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case." § 2929.05(A). Implicit in the requirement that a court consider the mitigating factors "present in the case" is that the court must necessarily determine which mitigating factors are actually present in that case.

who physically abused Bies's mother before he abandoned the family," mitigated the seriousness of his offense. *Bies*, 658 N.E.2d at 761. It determined that his history of mental health problems, disruptive behavior and suicide attempts were mitigating factors. *Id.* The Court found that Petitioner's young age at the time of the crime mitigated its seriousness, and it determined that his lack of a prior criminal record was also a mitigating factor. *Id.* Each of these determinations were a necessary part of the court's duty to examine the entirety of the facts available to the jury and weigh them against the aggravating factors proven at trial. *Jordan*, 804 N.E.2d at 16. Such a weighing could not have occurred unless the court first determined what to place on either side of the scale.

Because the Supreme Court of Ohio found that Petitioner is mentally retarded pursuant to a mandatory duty to weigh the aggravating circumstances in his case against any mitigating factors which could be found in the record, we hold that the determination of this issue was "necessary to the outcome" of Petitioner's direct appeal, and thus the second prong of the collateral estoppel test is met. *N.A.A.C.P.*, 821 F.2d at 330.

3. The Finality of the State Supreme Court's Judgment

Under the third prong of the collateral estoppel test, the proceeding in which Petitioner was found to be mentally retarded "must have resulted in a final judgment on the merits." *Id.* This prong is easily established here. Petitioner was found to be mentally retarded in final judgment by the Supreme Court of Ohio. *Bies*, 658 N.E.2d at 761. The Supreme

Court of Ohio is the court of last resort in that state; Ohio law does not allow appellate review of its supreme court's decisions; *see* Ohio Rev. Code § 2953.02, and the United States Supreme Court denied review of the state supreme court's decision. *Bies v. Ohio*, 517 U.S. 1238, 1238 (1996). Accordingly, we hold that the decision which found Petitioner to be mentally retarded led to a final judgment on the merits of his case.

4. The State's Opportunity to Litigate Petitioner's Mental Retardation

The final prong of the collateral estoppel test requires that "the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." *N.A.A.C.P.*, 821 F.2d at 330. We conclude that this prong is also established by the record in this case.

The government argues against such a conclusion by claiming that the parties "did not really have a fair opportunity before *Atkins* to litigate" the issue of Petitioner's mental retardation. (Respondent's Br. at 35-36) This argument, however, ignores the record. On direct appeal to the Ohio Court of Appeals and the Supreme Court of Ohio, Petitioner's mental retardation was a contested issue. In briefs before both courts, both parties presented arguments and cited evidence in the record regarding whether Petitioner suffers from mental retardation. In both courts, the government contested Petitioner's claim that he is "supposedly retarded," and cited evidence to support this claim. (J.A. 789-90, 830-31) Both courts found Petitioner's arguments more compelling. *Bies*, 658 N.E.2d at 761; *Bies*, 1994 WL 102196 at *9. For the government to

now claim that the parties did not have a fair chance to litigate Petitioner's mental retardation ignores its own zealous advocacy on direct appeal.

We find that Petitioner and the government vigorously litigated the issue of his mental retardation during Petitioner's direct appeals. The government did not claim at any point during those proceedings that they were somehow unfair, or otherwise denied them a full and fair chance to present their arguments against a finding that Petitioner is mentally retarded. Furthermore, this Court has no reason to doubt the fairness of the jurists on the Ohio Court of Appeals and the Supreme Court of Ohio, and the government presents no evidence to this Court that the Ohio judges paid insufficient regard to their arguments that Petitioner is not mentally retarded. Accordingly, we conclude that the final prong of the collateral estoppel test has been established in this case. Moreover, as "death is not a suitable punishment for a mentally retarded criminal," *Atkins*, 536 U.S. at 321, the Supreme Court of Ohio's determination that Petitioner is mentally retarded is "sufficient to establish legal entitlement to the life sentence." *Sattazahn*, 537 U.S. at 109. We therefore hold that Petitioner cannot be forced to relitigate the issue of his mental retardation under the Double Jeopardy Clause. *Ashe*, 397 U.S. at 443.

5. A Right Limited To The Accused

In an attempt to circumvent the Double Jeopardy Clause, the government also claims that double jeopardy does not apply here because two Ohio court decisions have allowed the mental retardation issue to be relitigated. *See State v.*

Lorraine, No. 2003-T-0159, 2005 WL 1208119 at *3 (Ohio Ct. App. May 20, 2005); *State v. Bays*, 824 N.E.2d 167, 171 (Ohio Ct. App. 2005). Neither of these cases are relevant to the instant matter. In both cases, earlier state proceedings had concluded that a capital defendant was not mentally retarded, and thus it was the government, not the petitioner, who was claiming collateral estoppel. *Lorraine*, 2005 WL 1208119 at *3; *Bays*, 824 N.E.2d at 171. The Double Jeopardy Clause, however, has never been applied to allow a state to prevent relitigation of an issue. Much to the contrary, it exists for the sole purpose of protecting individual defendants against the power of overzealous state prosecutions. *See Bullington*, 451 U.S. at 445 ("The underlying idea [of the Double Jeopardy Clause] is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

Moreover, insofar as collateral estoppel is a doctrine which exists independent of the Double Jeopardy Clause, *see Ashe*, 397 U.S. at 443, a state actor may not avail itself of this doctrine in the criminal context. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005); *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1244 (10th Cir. 1998); *United States v. Pelullo*, 14 F.3d 881, 893 (3d Cir. 1994); *United States v. Harnage*, 976 F.2d 633, 633 (11th Cir. 1992). Outside of the double jeopardy context, the doctrine of collateral estoppel exists because of concerns over judicial economy and finality—in most cases, a promptly issued decision, not subject to endless appeals and relitigation, is desirable. *Pelullo*, 14 F.3d at 893; *Harnage*, 976 F.2d at 634. In criminal cases, however

"finality and conservation of private, public, and judicial resources are lesser values than in civil litigation." *Pelullo*, 14 F.3d at 893 (quoting *Ashe*, 397 U.S. at 465 (Burger, C.J., dissenting)). This is so, not because economy and finality lose value in the criminal context, but because in a criminal case, the defendant "has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[9] *In re Winship*, 397 U.S. 358, 363 (1970). As the Supreme Court has explained:

> [T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases . . . .

Standefer v. United States, 447 U.S. 10, 25 (1980).

Because of a criminal defendant's "interest of transcending value" in vindicating his rights in a criminal case, *Winship*, 397 U.S. at 364, we join the Third, Ninth, Tenth and Eleventh Circuits in holding that, in a criminal case, collateral estoppel may only be invoked by the accused. *See Smith-Baltiher*, 424 F.3d at 920; *Gallardo-Mendez*, 150 F.3d at 1244; *Pelullo*, 14 F.3d at 893; *Harnage*, 976 F.2d at 633.

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[9] Although a petition for a writ of habeas corpus constitutes a civil, not a criminal, proceeding, a habeas petitioner's interests in avoiding stigma and preserving his own liberty are no less than those of a criminal defendant.

Collateral estoppel's concern with swift, final adjudication cannot overcome a criminal defendant's interest in his own life and liberty. Accordingly, we reject the government's claim that, because Ohio law allows a death-row inmate to relitigate the issue of his mental retardation, *Lorraine*, 2005 WL 1208119 at *3; *Bays*, 824 N.E.2d at 171, we must apply the same standard when the government seeks to relitigate this same issue.

B. AEDPA

Even though the Double Jeopardy Clause prohibits relitigation of Petitioner's mental retardation, this Court may only grant his petition if he is in custody pursuant to a state court's decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court[,]" § 2254(d)(1), or which was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). In determining whether a state court unreasonably determined the facts of a case, this Court presumes that any "determination of a factual issue made by a State court" is correct. § 2254(e)(1). This presumption, however, may be rebutted by clear and convincing evidence. *Id.*; *Haliym v. Mitchell*, 492 F.3d 680, 690 (6th Cir. 2007).

Clear and convincing evidence does demonstrate that the Ohio state court based its decision to permit relitigation of Petitioner's mental retardation on unreasonable determinations of fact. In the Ohio trial court's decision denying Petitioner's motion for summary judgment, the court concluded that "while the record contains evidence that Mr.

Bies is mentally retarded, the Court is unable to determine whether the experts applied the test as laid out by [*Lott*] to determine this issue." (J.A. 1610) With respect to Dr. Winter's testimony, the Ohio trial court found that "Dr. Winter concludes that Mr. Bies is mildly mentally retarded. There is no analysis of this issue, however . . . ." (J.A. 1611) In a footnote, the opinion finds that Dr. Winter's diagnosis of Petitioner "appears to be based primarily on the IQ test." (J.A. 1611 n.1) These findings, however, are contrary to the record.

Dr. Winter's testimony comprises fifty-six pages of the record in this case. In it, Dr. Winter testified not only to Petitioner's low IQ, but also to his limited functional academic skills, his significant limitations to his ability to communicate, his significant limitations to his social and interpersonal skills, and his significant limitations to his ability to care for himself, in addition to testifying that all of these signs of mental retardation manifested at an early age. Contrary to the Ohio trial court's finding that Dr. Winter's diagnosis is "based primarily on the IQ test," her testimony clearly demonstrates that she considered each of the three factors contained in the clinical test for mental retardation, and found each of them present in Petitioner. *See Lott*, 779 N.E.2d at 1014.

Furthermore, the Ohio trial court's finding ignored Dr. Winter's occupation as a *clinical* psychologist in finding that it is "unable to determine" whether Dr. Winter applied the clinical standard for diagnosing Petitioner. The clinical test for assessing mental retardation, which is described in *Lott*, represents the standard level of care offered by clinical psychologists in diagnosing their patients.

See Atkins, 536 U.S. at 318 ("[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.") Moreover, this standard of care represents the consensus view of researchers and clinicians across the mental health care profession, and is used by "psychiatrists, other physicians, psychologists, social workers, nurses, occupational and rehabilitation therapists, counselors, and other health and mental health professionals." DSM-IV xxiii. By suggesting that Dr. Winter may have used an alternative method for diagnosing mental retardation, the Ohio trial court impliedly suggested that she may have committed malpractice without any basis in the record for such a suggestion. *See Bruni v. Tatsumi*, 346 N.E.2d 673, 676 (Ohio 1976) (holding that a health care professional may be liable for malpractice if they "did some particular thing or things that [providers] of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which [providers] of ordinary skill, care and diligence would have done under the same or similar circumstances.").

The standard for diagnosing mental retardation described in *Lott* was not created from whole cloth. Rather, *Lott* did no more than appropriate the very same standard of care which psychologists and other mental health care professionals have applied for decades. *See* DSM-III 28 (defining mental retardation in the same manner as *Lott* based on the standard of care in 1987). The record provides no evidence that Dr. Winter abandoned her professional training when she

diagnosed Petitioner as mentally retarded; indeed her own testimony expressly describes Petitioner as possessing each of the three traits required for a clinical diagnosis of mental retardation. In light of the overwhelming evidence that Dr. Winter did in fact apply the clinical standard recognized by her own profession, we conclude that clear and convincing evidence demonstrates that the Ohio trial court unreasonably found that Dr. Winter could have applied a different standard.

The Ohio trial court's determination that Dr. Winter may not have applied the clinical definition of mental retardation was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). As the Supreme Court of Ohio followed Dr. Winter's testimony in its 1996 finding that Petitioner is mentally retarded, *Bies*, 658 N.E.2d at 761, the Ohio trial court's unreasonable determination of fact led to its equally unreasonable determination that the 1996 finding relied on a different method than the one described in *Lott*. Accordingly, we hold that Petitioner's double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact.

CONCLUSION

Under the Double Jeopardy Clause, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443. This rule establishes an absolute bar to a state seeking to relitigate such an issue of ultimate fact, regardless of the

correctness of the original decision. *See Burks v. United States*, 437 U.S. 1, 16 (1978). We therefore do not concern ourselves with the merits of Petitioner's Atkins claim; the only question before this Court is whether the government, having litigated and lost the issue of Petitioner's mental retardation, is now attempting to reopen this question. *Gully*, 592 F.2d at 287 (holding that a criminal defendant may not be "twice put in jeopardy.")

Having examined the record in this case, we determine that Petitioner was found to be mentally retarded, under the clinically accepted definition of mental retardation, by a final judgment of the Supreme Court of Ohio. We further determine that the government is now seeking to relitigate this identical issue, that the Supreme Court of Ohio's finding was necessary to its judgment, and that the government had a full and fair opportunity to litigate this issue on direct appeal. *N.A.A.C.P.*, 821 F.2d at 330. Accordingly, this case is controlled by the United States Supreme Court's decision in Ashe, and this Court is obligated to follow that decision. As § 2254 does not require us to defer to the state court's judgment in this case, we therefore **AFFIRM** the decision of the district court granting habeas relief to Petitioner, vacating his sentence of death, and ordering that he be resentenced to receive a sentence other than death.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael Bies,

Petitioner,

vs.

Margaret Bagley, Warden,

Respondent.

Case No. 1:00-cv-682

Filed: March 1, 2006

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
SUPPLEMENT AND GRANTING
WRIT OF HABEAS CORPUS

This matter is before the Court on the Magistrate Judge's Report and Recommendation and Supplement on Petitioner's bifurcated Nineteenth Claim for Relief (docs. ##s 107, 110) ("Reports"); Respondent's Objections (docs. ##s 108, 111); and Petitioner's Responses (docs. ##s 109, 112). Upon review of the Magistrate's well-reasoned Reports, the parties' papers, and relevant authority, the Court **ADOPTS** the Magistrate's Reports (docs. ##s 107, 110) in their entirety.

The Court accordingly **GRANTS** Petitioner's Third Amended Petition for Writ of Habeas Corpus (doc. # 93) as to Petitioner's bifurcated Nineteenth Claim for Relief and **ISSUES** a writ of habeas corpus *ad subjiciendum* requiring the State of Ohio to vacate Petitioner's unconstitutional sentence of death and re-sentence him, in accordance with Ohio law, to some other sentence. This writ pertains exclusively to Petitioner's death sentence on his aggravated murder charge, and does not reach Petitioner's underlying aggravated murder conviction or his other convictions or sentences.

IT IS SO ORDERED.

s/Susan J. Dlott
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Michael Bies,

Petitioner,

vs.

Margaret Bagley, Warden,

Respondent.

Case No. 1:00-cv-682

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This case is before the Court on Respondent's Objections (Doc. No. 108) to the Magistrate Judge's Report and Recommendations on the merits of Petitioner's Nineteenth Claim for Relief (Doc. No. 107). Petitioner has responded to those Objections (Doc. No. 109). The General Order of Reference for the Dayton location of court permits the Magistrate Judge to reconsider decisions or reports and recommendations when objections are filed.

In the original Report, the Magistrate Judge recommended that Petitioner be granted a writ of habeas corpus on his Nineteenth Ground for Relief, to wit, that the State of Ohio is barred by the Double Jeopardy Clause from forcing Petitioner to retry his

claim that he is mentally retarded; because that ultimate fact has been established by prior state court judgments, Petitioner is entitled to have his death sentence vacated.

Respondent makes essentially two objections:

1. The state court's determination on Petitioner's Double Jeopardy claim is not contrary to or an unreasonable application of clearly established law because "the Supreme Court of the United States has never held that a determination of mental retardation for the purposes of the Eighth Amendment is a fact that is subject to the protections of the Double Jeopardy Clause or a derivative doctrine of estoppel." (Objections, Doc. No. 108 at 7.)

2. The state courts in the initial proceedings "did not decide the factual issue of whether Bies is mentally retarded for the purposes of the Eighth Amendment, i.e., whether due to his level of intellectual and adaptive functioning, his execution would be cruel and unusual." *Id.* at 8.

First Objection: Clearly Established Law

The premise of Respondent's first objection is correct: The United States Supreme Court had never held that mental retardation is an ultimate fact whose establishment in a first criminal proceeding precludes its re-trial in a second proceeding because of the Double Jeopardy Clause. The critical question is whether any prior Supreme Court precedent is sufficiently close to require its application to this case.

Respondent correctly cites the generally applicable standard under 28 U.S.C. §2254(d)(1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–"
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

The Supreme Court first interpreted this language, added to the habeas corpus statute by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214) (the "AEDPA"), in *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Court explained *Williams* in *Bell v.* Cone, 535 U.S. 685, 122 S. Ct. 1843, 1849-50, 152 L. Ed. 2d 914 (2002):

> As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U.S., at 404-405, 120 S.Ct. 1495. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id.*, at 405-406, 120 S. Ct. 1495. The court may grant relief under the

> "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.*, at 409- 410, 120 S.Ct. 1495. *See also id.*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Earlier this year, the Court reaffirmed this analysis in *Brown v. Payton*, ___ U.S. ___, 125 S. Ct. 1432 (2005):

> A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor*, *supra*, at 405; *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (*per curiam*). A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v.*

> *Taylor*, *supra*, at 405; *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*).

As noted in the original Report, the entire decision of the Hamilton County Common Pleas Court on Petitioner's Double Jeopardy claim reads as follows:

> This matter is before the Court on Petitioner Michael Bies' Renewed Motion for Summary Judgment. The Court has considered the Motion and hereby denies the same. The Court incorporates by reference its prior decision, and to the extent not specifically stated, finds for the reasons discussed in its prior decision that the double jeopardy clause does not require summary judgment in this case.

(Decision and Entry of June 21, 2004; Supp. Apx. Vol. 9 at 97.) In fact there is no discussion whatever of federal Double Jeopardy law in either Judge Myers' first or second decision on Petitioner's motion for summary judgment. Respondent's Objections do not attempt to defend those decisions as reasonable applications of federal law. Instead, they seem to assert that there is no federal law to apply because the U.S. Supreme Court has never held mental retardation is a fact whose prior decision is protected by the Double Jeopardy Clause.

This approach reads the Supreme Court's jurisprudence under *Williams v. Taylor* entirely too narrowly. The Supreme Court has clearly held, long since, that a state court finding on an ultimate fact in a criminal case precludes retrying that ultimate fact. *Harris v. Washington*, 404 U.S. 55 (1971); *Ashe*

v. Swenson, 397 U.S. 436 (1970). Although the ultimate fact at issue in *Ashe* was the robber's identity, the Court's holding is in no way limited to that particular ultimate fact. The Court held "... when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.

The Magistrate Judge is aware that federal courts must evaluate state court decisions, not reasoning. *Early v. Packer*, 537 U.S. 3; 123 S. Ct. 362; 154 L. Ed. 2d 263 (2002)(per curiam) (In order to avoid being contrary to Supreme Court precedent, a state court decision need not cite the controlling precedent or even be aware of it "so long as neither the reasoning nor the result of the state-court decision contradicts them.") However, what is critical here is not Judge Myers' failure to cite or discuss *Ashe v. Swenson*. Rather, the state court decision evinces no understanding that a prior decision of an ultimate fact is binding in subsequent criminal litigation, as *Ashe* and its progeny have held.

While Respondent cites many cases in which the Supreme Court has reversed lower courts for misapplication of §2254(d)(1), the Court has not found every contested state court decision to be reasonable. Just last term in *Rompilla v. Beard*, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), the Court held that failure to investigate prior offenses which would be admitted at trial was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The state court holding to the contrary was held to be objectively unreasonable even though there was no prior Supreme Court precedent holding that this particular failure on the part of an attorney

would be ineffective assistance. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court also found state court's conclusion that representation was not ineffective to be objectively unreasonable.

The Common Pleas Court decision is objectively unreasonable because it ignores altogether the holing in *Ashe v. Swenson* that an ultimate fact, once determined in a criminal proceeding, is binding in all further proceedings in the same case.

Second Objection: Mental Retardation Undecided

In her second objection, the Warden asserts "the trial court did not decide the factual issue of whether Bies is mentally retarded for the purposes of the Eighth Amendment ban, i.e., whether die to his level of intellectual and adaptive functioning, his execution would be cruel and unusual." (Objections, Doc. No. 108 at 8.)

In arguing this objection, Respondent confuses two issues. She asserts "Bies claims that since there is evidence in the record that his IQ is below 70, the State is now prevented from litigating his mental retardation claim based on double jeopardy and collateral estoppel. However, as the state trial court held in its April 5, 2004 denial of Bies' motion for summary judgment, 'there are disputes of fact as to the IQ of Mr. Bies and as to the ultimate determination of whether he is or is not mentally retarded.'" Id., citing Supp. Apx., Vol. 9 at 69. This statement conflates two separate claims which Petitioner has made. First of all, Petitioner has claimed in the Hamilton County Common Pleas

Court that, on the evidence now before that court, he is entitled to summary judgment on his successive postconviction petition, brought under *State v. Lott*, 97 Ohio St. 3d 303, 779 N.E. 2d 1011 (2002). That claim is emphatically not before this Court at this time and in fact will never be before this Court in that form. Whether on a particular state of the evidence a state court post-conviction petitioner is entitled to summary judgment on a particular issue is a question of state law; error on that question would never entitle a federal habeas petitioner to relief. *See Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Therefore this Court will never review Judge Myers' decision to deny summary judgment.

However, Petitioner also claims that, regardless of what evidence is or might be before the Common Pleas Court on his successive post-conviction petition, there already exist binding decisions of the state courts on the question whether he is mentally retarded, to wit,

1. The Hamilton County Court of Appeals finding on direct appeal that Petitioner suffers from "mild mental retardation to borderline mental retardation." *State v. Bies*, 1994 WL 102196 (Ohio App. 1st Dist. March 30, 1994).

2. The Ohio Supreme Court's finding that Petitioner suffered from "mild to borderline mental retardation." *State v. Bies*, 74 Ohio St. 3d 320, 328, 658 N.E. 2d 754, 762 (1996).

3. Judge Kraft's finding of fact on Petitioner's first post-conviction petition that "[t]he defendant is shown by the record to be mildly mentally retarded

with an IQ of about 69."

The essence of Petitioner's Double Jeopardy claim is that the evidence now before the Common Pleas Court is irrelevant, just as the new identification testimony in the second trial in *Ashe v. Swenson*, as irrelevant.

Respondent argues at length that Petitioner has not established his mental retardation under the procedures adopted by the Ohio Supreme Court in *Lott, supra* (Objections, Doc. No. 108 at 10-13). That is certainly true. Nor is there any suggestion in the original Report and Recommendations that *Lott* is not an appropriate implementation of *Atkins v. Virginia*, 536 U.S. 304 (2002). However, the Supreme Court in *Atkins* did not purport to give States which had already found a death row inmate to be mentally retarded another chance to try that fact under new procedures. A useful analogy is found in the federal insanity defense. After John Hinckley shot President Reagan, Congress enacted the Insanity Defense Reform Act of 1984 which provided, inter alia, that a criminal defendant had the burden of proving insanity by clear and convincing evidence. 18 U.S.C. §17(b). Although the change was clearly motivated by the Hinckley case, no one suggested it was possible to re-try the defense in that case and Hinckley continues to have the "benefit" of the prior law which essentially required the Government to prove sanity whenever a defendant raised the issue. *See Lynch v. Overholser*, 369 U.S. 705 (1963). In this case not one, but three state courts made ultimate findings of fact – that Michael Bies is mentally retarded. That there might now be new procedures for determining mental retardation or new evidence showing that these courts were in error in finding

him retarded is immaterial. The Double Jeopardy Clause forbids retrying the issue.

Conclusion

Based on the foregoing analysis, it is again respectfully recommended that this Court issue a writ of habeas corpus *ad subjiciendum* requiring the State of Ohio to vacate Petitioner's capital sentence and re-sentence him in accordance with Ohio law to some other sentence.

December 30, 2005.
s/ Michael R. Merz
Chief United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of

it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Michael Bies,

Petitioner,

vs.

Margaret Bagley, Warden,

Respondent.

Case No. 1:00-cv-682

District Judge Susan J. Dlott
Chief Magistrate Judge Michael R. Merz

REPORT AND RECOMMENDATIONS

This case is before the Court on the merits of Petitioner's Nineteenth Claim for Relief. The Magistrate Judge previously bifurcated that claim from Petitioner's other habeas corpus claims (Decision and Order Granting Motion to Bifurcate, Doc. No. 102). Neither party objected and bifurcation has thus become the law of the case. Both parties have now briefed the Nineteenth Claim as bifurcated (Doc. Nos. 103, 104, and 105) and the claim is ripe for decision.

Petitioner's Nineteenth Claim, added by the Third Amended Petition, is as follows:

NINETEENTH CLAIM FOR RELIEF:

THE STATE OF OHIO IS PRECLUDED FROM CONTESTING MICHAEL BIES' MENTAL RETARDATION BECAUSE THE STATE TRIAL COURT, APPELLATE COURT AND SUPREME COURT HAVE ALREADY DETERMINED THAT HE IS MENTALLY RETARDED, AND THE STATE HAS REPEATEDLY CONCEDED THAT FACT. Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

(Third Amended Petition, Doc. No. 93 at iv.)

Thus in his Nineteenth Claim for Relief, Petitioner asserts that the Ohio courts have already determined that he is mentally retarded and that prior determination should be held to be conclusive so that he is not required to relitigate that issue in his currently-pending successive post-conviction proceeding before the Hamilton County Common Pleas Court.

At the time Petitioner was sentenced to death, Ohio law provided for direct appeals to both the intermediate court of appeals and the Ohio Supreme Court. At the first of those two appeals, the Hamilton County Court of Appeals found that Petitioner suffers from "mild mental retardation to borderline mental retardation." *State v. Bies*, 1994 WL 102196 (Ohio App. 1st Dist. March 30, 1994). The Ohio Supreme Court repeated the same finding, to wit, that Petitioner suffered from "mild to borderline mental retardation." *State v. Bies*, 74 Ohio St. 3d 320, 328, 658 N.E. 2d 754, 762 (1996).

After the Ohio Supreme Court decided the case, Petitioner filed his first petition for post conviction relief under Ohio Revised Code § 2953.21, asserting in his Fifth Claim for Relief that it would be unconstitutional to execute him because he is mentally retarded. Judge Kraft filed findings of fact, adopting the draft findings prepared by the prosecutor. One of his findings is "[t]he defendant is shown by the record to be mildly mentally retarded with an IQ of about 69." With respect to that finding, he adopted a conclusion of law: "As a matter of law, a mildly mentally retarded defendant may be punished by execution. *State v. Holloway*, 38 Ohio St. 3d 239 (1988)." Judge Kraft's finding of mental retardation was not disturbed on appeal where the Court of Appeals instead concluded that the claim was barred by *res judicata* because it could have been raised on direct appeal. *State v. Bies*, 1999 WL 445692 (Ohio App. 1st Dist. June 30, 1999)).

After the state court proceedings were complete and Petitioner had filed in this Court, the United States Supreme Court decided that the mentally retarded may not be executed. *Atkins v. Virginia*, 536 U.S. 304 (2002). In doing so, it overruled its prior holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989), that execution of the mentally retarded was constitutionally permissible under the Cruel and Unusual Punishment Clause. Because *Atkins* goes to the constitutionality of the execution, it of necessity applies to persons already convicted and sentenced to death.

The question before this Court, then, is whether these multiple, consistent state court findings of mental retardation conclusively establish for purposes of this case that Michael Bies is

mentally retarded and therefore may not be executed.

After *Atkins* was decided, this Court stayed the habeas corpus proceedings to give Petitioner an opportunity to file a successive state court post-conviction petition to raise his claim of mental retardation as permitted by the Ohio Supreme Court in *State v. Lott*, 97 Ohio St. 3d 303, 779 N.E. 2d 1011 (2002). Petitioner has done so in a timely manner and those proceedings are not yet complete: the Hamilton County Common Pleas Court has denied Petitioner's summary judgment motion and found that there are genuine issues of material fact as to his IQ (Supp. Apx., Vol. 9 at 69-71). That court also denied the double jeopardy claim that Petitioner makes here (Supp. Apx., Vol. 9 at 66-72 and 96-97).

The State argues that Petitioner has not yet exhausted his claim of mental retardation in the state courts and this Court agrees. Under *Lott*, *supra*, he has the right to a hearing on his successive post-conviction petition in the Common Pleas Court, an appeal of right to the Hamilton County Court of Appeals, and a discretionary appeal to the Ohio Supreme Court.[1] This Court may not consider an unexhausted claim. 28 U.S.C. §2254(b)(1)(A). The Court agrees with Respondent that the mental retardation claim is not exhausted; indeed, Petitioner does not disagree.

However, the Double Jeopardy claim is

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[1] Petitioner also has the right to seek a writ of certiorari from the United States Supreme Court if he is unsuccessful in the Ohio Supreme Court. However, that is not a state court remedy and need not be exhausted before bringing the mental retardation claim back to this Court.

exhausted: Petitioner has obtained a decision on the merits of that claim from the Hamilton County Common Pleas Court and cannot obtain judicial review of that decision in the Ohio courts prior to a hearing on the merits. *State v. Crago*, 53 Ohio St. 3d 243, 244, 599 N.E. 2d 1353 (1990)(direct appeal); *Wenzel v. Enright*, 68 Ohio St. 3d 63 (1993) (extraordinary writ). As this Court noted in granting bifurcation, Respondent had admitted that the Double Jeopardy claim was exhausted (*See* Decision and Order Granting Motion to Bifurcate, Doc. No. 102 at 3, citing Respondent's Memorandum in Opposition, Doc. No. 99 at 3.) It is only Ground 19, the Double Jeopardy claim, which is before this Court at this time. As this Court held in granting the Petitioner's Motion to add the Double Jeopardy claim, (1) a state court defendant with a colorable double jeopardy claim is entitled to have that claim adjudicated in federal habeas corpus before being placed in jeopardy a second time, and (2) the Double Jeopardy Clause protects against a second trial of an issue, not just a second conviction. *Abney v. United States*, 431 U.S. 651 (1977); *Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984); *Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 408 (7th Cir. 1985); *Malinovsky v. Court of Common Pleas of Lorain County*, 7 F.3d 1263 (6th Cir. 1993). To put it another way, a habeas petitioner with a double jeopardy claim is not required to exhaust the remedy of direct appeal before invoking our habeas jurisdiction. The Sixth Circuit reaffirmed these principles and specifically affirmed a district court's granting of a stay of Ohio Common Pleas Court proceedings pending decision on a pre-trial double jeopardy habeas petition in *Harpster v. State of Ohio*, 128 F.3d 322 (6th Cir. 1997).

The Double Jeopardy Clause of the Fifth Amendment is fully applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969). The doctrine of collateral estoppel is embodied in the guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 442, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). As thus embodied, the doctrine "stands for an extremely important principle in our adversary system of justice."

> It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85, 37 S. Ct. 68, 61 L. Ed. 161(1916)(Holmes, J.)

Ashe at 443.

Whether a particular person is mentally retarded is plainly a question of fact. Is it a question of ultimate fact so as to preclude a relitigation of a finding that Petitioner is mentally retarded? In *Ashe* Justice Stewart noted the method that would be applied to decide that question:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and

> conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe at 444, quoting Mayers & Yarbrough, Bis Vixari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39. Justice Stewart was adverting to the distinction between evidentiary facts and ultimate facts adumbrated by Learned Hand in *The Evergreens v. Nunan*, 141 F.2d 927 (2nd Cir. 1944). See 1B Moore's Federal Practice 2d ¶0.442[2](1996).

Here, Petitioner sought to prove at trial the existence of his mental retardation as a mitigating factor.[2] Capital defendants are required to prove the existence of mental retardation as a mitigating factor by a preponderance of the evidence. Ohio Rev. Code § 2929.03(D)(1). A large number of evidentiary facts were introduced on this question; they are summarized in the Petitioner's Memorandum in Support (Doc. No. 103 at 2-3) and in Respondent's Memorandum in Opposition (Doc. No. 104 at 5-7).

As Respondent notes, the State was not required to prove the absence of mental retardation because that is not an element of the crime of aggravated murder (Memorandum in Opposition,

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[2] The Ohio Supreme Court has expressly held on a number of occasions that mental retardation was a proper mitigating factor. *State v. Rojas*, 64 Ohio St. 3d 131, 143, 592 N.E. 2d 1376, 1386-7 (1992); *State v. Hill*, 64 Ohio St. 3d 313, 595 N.E. 2d 884 (1992); *State v. Green*, 66 Ohio St. 3d 141, 153, 609 N.E. 2d 1253, 1263 (1993). Even without those express holdings, evidence of mental retardation in mitigation would have been admissible under *Lockett v. Ohio*, 438 U.S. 586 (1978).

Doc. No. 104 at 10). However, it was required to prove beyond a reasonable doubt, to the satisfaction of the jury and three different levels of judges, that the aggravating circumstances outweighed the mitigating factors which had been shown to exist, so the question of Petitioner's mental retardation *vel non* was critical to the State's case. As Petitioner's Memorandum demonstrates, the State vigorously opposed the conclusion that Petitioner was mentally retarded until, in drafting the proposed findings of fact and conclusions of law on post-conviction, it conceded mental retardation because the law at that time did not preclude executing the mentally retarded (Doc. No. 103 at 3-4).

Of course, in a capital case we have a good deal more than a general verdict from which to determine what ultimate facts were decided. In this case, we have express findings of fact from all three levels of the Ohio court system that the Petitioner is mentally retarded. Nor can these be regarded as inessential to the judgments of those courts. In the two appellate cases, each court was required by Ohio law to independently reweigh the aggravating circumstances against the mitigating factors to decide if the death penalty was appropriate. On the post-conviction petition, the judge was required to make findings of fact and conclusions of law; he did so by adopting verbatim the finding proposed by the State, to wit, that Petitioner was mentally retarded.

Respondent argues that there is conflicting evidence as to whether Michael Bies is mentally retarded or not (Memorandum in Opposition, Doc. No. 104 at 5-6) . This puts Respondent in the same position as the prosecutor in *Ashe*, *supra*. In that case, as here, there was conflicting evidence as to the

identity of the robber at the first trial. The State, as it did here, presented what it thought would be enough evidence to persuade the jury that the defendant was the robber, but the jury returned a not guilty verdict. Then the State, having gathered more evidence, tried the defendant as to a second victim and obtained a conviction.[3] Here as well the State has gathered more evidence and seeks a different determination from a different fact finder.[4] But that is precisely the result that the Double Jeopardy Clause proscribes.

Respondent also argues that, "all of Bies' testing was done prior to *Atkins* and *Lott*, so it is unclear what standards the experts used to determine his mental intelligence." (Memorandum in Opposition, Doc. No. 104 at 6, quoting Supp. Apx. Vol. 9, at 69-70.) However, as noted by Petitioner, *Atkins* and *Lott* both adopt pre-existing definitions of mental retardation from the American Psychiatric Association's Diagnostic and Statistical Manual (Third Edition, Revised) which were standard in the mental health professions well before Petitioner's trial (Memorandum in Support, Doc. No. 103 at 10, n. 3).

The effect of a prior state court judgment in subsequent federal litigation is ordinarily the same effect as would be given the judgment in the courts of the rendering state. 28 U.S.C. §1738; *Marrese v.*

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[3] Apparently, the defendant there did not seek habeas corpus relief before his second trial.

[4] Judge Robert Kraft has died since the trial and post-conviction decision. *State v. Lott*, *supra*, prescribes that the trial judge rather than a jury is to be the fact finder on successive post-conviction petitions and future trials claiming mental retardation as a bar to execution.

American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); *Migra v. Warren City School District Board of Edn.*, 465 U.S. 75 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Gutierrez v. Lynch*, 826 F. 2d 1534 (6th Cir. 1987). However, in *Ashe*, *supra*, the Supreme Court held that the application of the prior judgment was "a matter of constitutional fact we must decide through an examination of the entire record." 397 U.S. at 443.

Petitioner argues that this Court should apply pre-trial *de novo* review pursuant to 28 U.S.C. §2241 to decide if relitigation is precluded (Memorandum in Support, Doc. No. 103 at 12). However, all of the cited authority is pre-AEDPA. In that statute, Congress provided at 28 U.S.C. § 2254(d)(1) that

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

The Sixth Circuit applies the unreasonable application prong of 2254(d)(1) to mixed questions of law and fact. *Hunt v. Mitchell*, 261 F. 3d 575, 580 (6th Cir. 2001), *citing Harpster v. Ohio*, 128 F. 3d 322, 327 (6th Cir. 1997). The question of whether the Double Jeopardy Clause bars retrial of the mental retardation issue appears to this Court to be a mixed question of law and fact, that is, a question of the

applicability of the Double Jeopardy Clause jurisprudence to the prior state court determinations of mental retardation. Supreme Court law on the unreasonable application prong of §2254(d)(1) is clear:

> The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*,[*Williams v. Terry*] at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.*, at 409- 410, 120 S.Ct. 1495. See also *id.*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Bell v. Cone, 535 U.S. 685 (2002).

> A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra*, at 405; *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*).

Brown v. Payton, __ U.S. __, 125 S. Ct. 1432 (2005).

In her first Decision (April 5, 2004), Judge Myers does not advert to the Double Jeopardy question. She decides that there are genuine issues of material fact on the question of mental retardation upon the evidence presented in the post-conviction proceeding. She decided that neither judicial estoppel nor the law of the case doctrine applied, but did not discuss collateral estoppel. Petitioner renewed his motion for summary judgment, expressly calling the court's attention to the Double Jeopardy claim he had made in the first motion. Judge Myers' entire decision on the renewed motion reads as follows:

> This matter is before the Court on Petitioner Michael Bies' Renewed Motion for Summary Judgment. The Court has considered the Motion and hereby denies the same. The Court incorporates by reference its prior decision, and to the extent not specifically stated, finds for the reasons discussed in its prior decision that the double jeopardy clause does not require summary judgment in this case.

(Decision and Entry of June 21, 2004; Supp. Apx. Vol. 9 at 97.)

With all due respect to a fellow jurist, this Court concludes that Judge Myers' decisions on applicability of the Double Jeopardy Clause are an unreasonable application of federal law clearly established by the Supreme Court of the United States.

A state court decision can constitute an "adjudication on the merits" entitled to deference under 28 U. S.C. §2254(d)(1) even if the state court does not explicitly refer to the federal claim or to relevant federal case law. "'Adjudicated on the merits' has a well-settled meaning: a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2nd Cir. 2001). "Under the Supremacy Clause, state courts are obligated to apply and adjudicate federal claims fairly presented to them." *Sellan*, *citing Testa v. Katt*, 330 U.S. 386 (1947).

On the other hand, if the state court does not rule on a federal claim before it, federal review of that claim is de novo, rather than deferential. *McKenzie v. Smith*, 326 F. 3d 721, 727 (6th Cir. 2003)(when "there are no results, let alone reasoning, to which this court can defer . . ., any attempt to determine whether the state court decision was contrary to, or involved an unreasonable application of clearly established federal law would be futile.");(*Maples v. Stegall*, 340 F. 3d 433 (6th Cir. 2003), relying on *Wiggins v. Smith*, 510 U.S. 539 (2003). §2254(d)(1) does not require federal court acceptance of every decision a state court makes on a federal claim. *Wiggins*; *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

Here this Court simply does not know what Judge Myers thought about the Double Jeopardy issue except that she believed it was adequately covered by her prior decision. However, the issues involved in applying *Ashe v. Swenson* and its progeny to this case are not the same as the issues of

whether there are genuine issues of material fact in the pending 2953.21 proceeding or whether judicial estoppel or law of the case preclude relitigation. In particular, judicial estoppel would only apply if the State had previously argued in favor of mental retardation and been successful, *Warda v. Commissioner of Internal Revenue*, 15 F. 3d 533, 538 (6th Cir. 1994); as the above analysis shows, the State has always opposed that finding or, at worst, conceded it, but never advanced it. The law of the case doctrine applies to legal conclusions reached earlier in the case (e.g., that mental retardation does not preclude execution), not to findings of fact.

Conclusion

Upon the analysis set forth above, this Court should conclude that the Double Jeopardy Clause bars retrying the issue of whether Petitioner is mentally retarded. That fact is conclusively established for purposes of this habeas corpus proceeding by the prior state court judgments.

This Court should issue a writ of habeas corpus *ad subjiciendum* requiring the State of Ohio to vacate Petitioner's capital sentence and re-sentence him in accordance with Ohio law to some other sentence.

November 23, 2005.
s/ Michael R. Merz
Chief United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(B), (C), or (D) and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir., 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Respondent,

vs.

MICHAEL BIES,

Defendant-Petitioner.

Case No. B9205607

Judge Beth A. Myers

DECISION AND ENTRY

This matter is before the Court on Petitioner Michael Bies' Renewed Motion for Summary Judgment. The Court has considered the motion and hereby denies the same. The Court incorporates by reference its prior decision, and to the extent not specifically stated, finds for the reasons discussed in its prior decision that the double jeopardy clause does not require summary judgment in this case.

s/Beth A. Meyers, Judge
Entered: June 21, 2004

Copies by fax to:
Mark Piepmeier
Assistant Hamilton County Prosecutor

Hamilton County Prosecutor's Office
230 E. 9th Street, Suite 4000
Cincinnati, OH 45202
FAX (513) 946-3100

Counsel for Plaintiff

S. Scott Haynes
Hallowes, Allen & Haynes
6445 East Livingston Avenue
Reynoldsburg, OH 43068
FAX (614) 868-0029

David H. Bodiker
Ohio Public Defender
Randall L. Porter
Assistant Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, OH 43215-2998
FAX (614) 728-3670

Counsel for Defendant

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

MICHAEL BIES,

Defendant.

Case No. B9205607

DECISION

Entered and Scanned April 5, 2004

This matter is before the Court on Petitioner's Motion for Summary Judgment on his third cause of action. Based upon the record in this case, and for the reasons discussed below, the Court finds that there are genuine issues of material fact and that the Court cannot say that Petitioner is entitled to judgment as a matter of law. Petitioner's Motion is therefore denied and this matter is set for further proceedings.

INTRODUCTION

Petitioner has filed a Mental Retardation Petition seeking to have his death penalty sentence set aside. Under Count 3 of this Petition, Petitioner

argues that he is mentally retarded and that his execution would therefore be in violation of the Eighth Amendment. The only issue before the Court at this time is whether Petitioner is entitled to summary judgment on this Count, or whether further proceedings are required. Petitioner argues that based on the existing record, the evidence is undisputed that he is mentally retarded and &at he is entitled to judgment as a matter of law. The State argues that there are disputed facts and that it cannot be said as a matter of law that Petitioner is mentally retarded.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of material fact that remain to he litigated and the moving party is entitled to judgment as a matter of law. Civ. R. 56(C); *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 106 S. Ct. 2548. Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, written admissions, &davits, transcripts of evidence in the pending case, if any, timely filed in the action and construed most strongly in favor of the non-moving party, show that there is no genuine issue as to any material fact. Civ. R. 56(C). The burden of establishing that the material facts are not in dispute, and that no genuine issue of fact exists, is on &he party moving for summary judgment. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164. If the moving party asserts that there is an absence of evidence to establish an essential element of the nonmoving party's claim, the moving party cannot discharge this burden with a conclusory allegation, but must specifically point to some part of the record which affirmatively demonstrates this absence of

evidence. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

The Ohio Supreme Court has established three factors to be considered upon a motion for summary judgment. These three factors are:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that the conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

Bostic v. Connor (1988), 37 Ohio St. 3d 144, 146 N.E. 2d 881 (quoting *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 375 N.E. 2d 46).

Once a motion for summary judgment has been made and supported as provided in Civ. R 56(C), the nonmoving party then has a reciprocal burden to set forth specific evidentiary facts showing the existence of a genuine issue for trial and cannot rest on the allegations or denials in the pleadings. *Wing v. Ancho Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111, 570 N.E.2d 1095.

APPLICABLE LAW

There is no doubt that a mentally retarded person may not he executed. In *Atkins v. Virginia* (2002), 536 U.S. 304, the United States Supreme Court ruled the execution of mentally retarded defendants are "cruel and unusual punishments"

prohibited by the Eighth Amendment. The Court observed:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

Atkins v. Virginia, 536 U.S. 306-307.

The Court recognized that both the American Association on Mental Retardation and the American Psychiatric Association had similar clinical definitions of mental retardation.

The Ohio Supreme Court in *State v. Lott* (2002), 97 Ohio St. 3d 303, has established the law and procedures governing claims of mental retardation in the Courts of Ohio. Specifically, the Court stated:

> Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. Id. at fn. 3, citing definitions from the American Association of Mental Retardation and the American Psychiatric Association. These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-

> direction, and (3) onset before the age of 18. Most state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below. See Ky.Rev.Stat. 532.130 and 532.140; Neb.Rev.Stat. 28-105.01(2); N.M.Stat. 31-20A-2.1; N.C.Stat. 15A-2005; S.D. Codified Laws 23A-27A-26.2; Tenn.Code 39-13-203(b); and Wash.Rev.Code 10.95.030(2). While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination of this issue. *Murphy v. State*, 54 P.3d at 568, 2002 OK CR 32, at ¶ 29. We hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.

Moreover, the Court is to decide whether Petitioner is mentally retarded using a preponderance of the evidence. *Id.* It is Petitioner's burden to establish. *Id.*

ANALYSIS

In the present case, there are disputes of fact as to the IQ of Mr. Bies and as to the ultimate determination of whether he is or is not mentally retarded.

The first factor to be considered by this Court is whether Mr. Bies suffers from subaverage intelligence. IQ is one of the factors considered. Regarding Mr. Bies' IQ, there is conflicting evidence in the record. On the one hand, there is evidence indicating that Mr. Bies has an IQ below 70: 1) February 6, 1985, examination shows IQ of 50; 2) September 11, 1992 report regarding NGRI comments that Dr. Winters found an IQ of 68; and,

3) 1992 NGRI report finds full scale IQ of 68 with performance IQ at 67 and verbal IQ at 70.

On the other hand, there is evidence that Mr. Bies' IQ is over 70, thus giving rise to a rebuttable presumption that he is not mentally retarded. For example, Exhibit E to Petition to Vacate which shows an IQ of 74 in 1983. Moreover, in September 1996, Dr. Haskins found an IQ of 72. (Exhibit J to Appendix to Petition to Vacate filed September 20, 1996.)

The Court may not weigh the credibility of the evidence at the summary judgment stage. There is a genuine issue of material fact as to Mr. Bies' IQ and whether he is of subaverage intelligence precluding summary judgment.

Moreover, while the record contains evidence that Mr. Bies is mentally retarded, the Court is unable to determine whether the experts applied the test as laid out by the courts to determine this issue. Much of the language is conclusory. Moreover, the experts rendered opinions prior to *Atkins* and *Lott*, and the Court cannot determine whether they engaged in the analysis no required.[1]

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[1] Mr. Bies argues that the definitions for mental retardation by the American Psychiatric Association and the American Association of Mental Retardation are the same now as they were when the experts examined Mr. Bies. While this may be true, the three experts appointed in 1992, which Mr. Bies relies on, were appointed to determine NGRI, not mental retardation. Moreover, the statements regarding mental retardation are made in a conclusory manner without any analysis. See Exhibit 7 and 14 in support of Motion for Summary Judgment. Dr. Winter's opinion contains more of an analysis, but her opinion as to mental retardation appears to be based primarily on the

For example, in her September 11, 1992 NGRI report, Dr. Winters concludes that Mr. Bies is mildly mentally retarded. There is no analysis of this issue, however, and it was not the purpose for her examination. The April 8, 1993, examination from St. Elizabeth in Illinois concludes that Mr. Bies has below normal intelligence with possible mental retardation. There is no further analysis on this issue. The 1992 NGRI report states that Mr. Bies tests in the range of mild mental retardation, but also finds that he lives unassisted in the community and carries out activities of daily life fairly and independently. Again, the issue of mental retardation was not the purpose of the evaluation.

Defendant also argues that Court findings establish that Mr. Bies is mentally retarded. For example, the 1994 Court of Appeals decision (*State v. Bies* (Ohio App. 1st Dist. March 20, 1994), 1994 WL 102196) noted that Mr. Bies suffered "mild mental retardation to borderline mental retardation." It made no analysis of the issue under the legal standard of *Atkins* and *Lott*, which had yet to be decided. The Ohio Supreme Court made a similar conclusion. *State v. Bies* (1996), 658 N.E.2d 754.

Further, this Court's predecessor did find in its Findings re: Petition to Vacate dated July 22, 1998, that Mr. Bies was mildly mentally retarded, with an IQ of about 69. The court went on to conclude that under the law at that time, a mildly

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IQ test. Despite Mr. Bies' statements to the contrary, Dr. Fuess makes no conclusion on mental retardation. He is simply stating that his intellectual abilities are estimated to fall within the borderline range.

mentally retarded person could be executed. Since this ruling, *Atkins* and *Lott* have been decided. These cases provide the test to determine whether someone is mentally retarded for purposes of the present analysis. There is no indication that the Court applied the analysis now required. Therefore, the Court cannot conclude as a matter of law that Mr. Bies is mentally retarded under the standards of *Lott*.

Finally, Mr. Bies argues that the State is precluded and estopped from now arguing that Mr. Bies is not mentally retarded, having previously conceded this issue. Because the issues were not identified and the analysis of *Lott* and *Atkins* had not yet been established by the Courts, the Court did not find the State if precluded from arguing that Mr. Bies is not mentally retarded. Neither judicial estoppel nor law of the case apply under the unique facts of this case. *New Hampshire v. Maine* (2001), 532 U.S. 742, 121 S. Ct. 1808; *Dannaher v. Crawford* (1997), 78 Ohio St. 3d 391, 1997 Ohio 72, 678 N.E.2d 549; *Hubbard v. Sauline* (1996), 74 Ohio St. 3d 402, 1996 Ohio 174, 659 N.E.2d 781.

The Court recognizes that there is a serious issue as to Mr. Bies' mental status. The Court cannot reach a determination on this issue on the record before it as a matter of law. Thus, summary judgment is denied and the matter will continue for further proceedings.

s/Beth A. Myers, Judge
Entered April 5, 2004

Copies by fax to:

Mark Piepmeier
Assistant Hamilton County Prosecutor
Hamilton County Prosecutor's Office
230 E. 9th Street, Suite 4000
Cincinnati, OH 45202
FAX (513) 946-3100

Counsel for Plaintiff

S. Scott Haynes
Hallowes, Allen & Haynes
6445 East Livingston Avenue
Reynoldsburg, OH 43068
FAX (614) 868-0029

David H. Bodiker
Ohio Public Defender
Randall L. Porter
Assistant Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, OH 43215-2998
FAX (614) 728-3670

Counsel for Defendant

APPENDIX H

SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

MICHAEL BIES,

Appellant.

Case No. 94-1538

DECISION

Submitted: November 7, 1995
Decided: January 17, 1996

[Cite as *State v. Bies* (1996), __ Ohio St.3d __.]

Criminal law -- Aggravated murder -- Death penalty upheld, when.

Appeal from the Court of Appeals for Hamilton County, No. C-920841.

Shortly after daybreak on May 12, 1992, police found the bludgeoned body of ten-year-old Aaron Raines in the basement of an abandoned building in the 2100 block of West Eighth Street in Cincinnati. A nine-week investigation led the police to two suspects: Darryl "Junior" Gumm and defendant-appellant Michael Bies.

The police investigation revealed that the day before Aaron's body was discovered, Gumm and Bies were drinking beer and idling the day away in a park adjacent to the abandoned building in which Aaron's body was found. As evening approached, they decided they wanted to have sex with a child.

Aaron Raines, a small ten-year-old, was playing in the park that evening. Aaron had had some physical difficulties as the result of being struck by a van a year earlier. In addition, Aaron wore a partial cast on his right foot because he had dropped weights on his toe earlier that spring.

Gumm, who knew Aaron, approached the boy and offered him $10 to help him and Bies remove scrap metal from an abandoned building near the park.

After Aaron accepted Gumm's offer, Bies, Gumm and Aaron entered one abandoned building and crossed over a walkway into a second abandoned building. At this point, Aaron began to resist. Once inside this second building, Gumm attempted to have intercourse with Aaron, but Aaron screamed and resisted. When Aaron refused, Gumm struck him. Aaron began to cry. Bies admitted striking Aaron with a wooden board across the chest or head. Gumm then carried Aaron down into the basement of that building.

The beating continued in the basement. Bies further admitted he hit Aaron with a pipe three or four times, and with a piece of concrete, two or three times. Aaron was also kicked with such force as to leave the imprint of shoe tread patterns on his body.

Bies and Gumm left Aaron in the basement. They returned to the first building and performed oral sex on one another. They then left the area and went their separate ways.

When Aaron did not return home that evening, his nineteen-year-old brother became concerned and began to look for him. When Aaron's mother came home from work that night, she phoned the police to report him missing. The police searched the surrounding area, but left the search of the abandoned buildings until morning because of their dilapidated condition.

When police discovered Aaron's body the next morning, several objects were located around the body, including a rock, a metal pipe, some rope and pieces of wood. Human hairs found on these objects were consistent with the hair sample taken from Aaron's head. Blood stains found on the pipe and piece of concrete were also consistent with Aaron's blood type.

The autopsy revealed that Aaron had sustained nineteen separate scalp lacerations, representing distinct injuries or impacts, and that there were so many tears of the scalp that they had become almost one wound. The wounds on the back of his head were consistent with injuries that would be left by the threads of a metal pipe. The entire left side of Aaron's face had been flattened by severe skull fractures caused by a very heavy and broad implement, such as a brick, a chunk of concrete, or a rock. Bleeding of the muscle tissue around Aaron's windpipe was observed, indicating pressure had been exerted around the neck by some sort of ligature, like a piece of twine.

Other injuries sustained by Aaron included five broken ribs, four of which punctured his right lung, a broken jaw, chipped teeth, a pattern injury on the back caused by some sort of long thin object like a tube or a stick, and scrapes on the back of the right leg consistent with drag marks. There was no evidence of any defensive wounds. Cause of death was multiple blunt injuries to Aaron's head, neck, chest and abdomen.

Police arrested Gumm and questioned him about his involvement in the murder. After talking to Gumm, the police went to Hazard, Kentucky, to question Bies.

Bies gave several statements to the police, two of which were taperecorded. Initially, he denied any involvement in the murder. However, once the police presented him with information they already had, Bies admitted that he was with Gumm that day, but essentially stated that Gumm was responsible for what had occurred.

As a result of his statements, the police arrested Bies and transported him to Cincinnati. Bies offered to return to the crime scene to refresh his memory of the events in order to assist the police in solving the case. As they walked through the buildings and the surrounding area, Bies offered detailed statements regarding the instruments used to kill Aaron, including that the pipe had threading around the top and that the weapons used to kill Aaron were similar in weight to other objects lying around the building.

When they returned to the police station, the

officers told Bies that they knew he was lying because of the detailed comments he had given at the crime scene. Bies then gave his last statement, which was unrecorded per his request, admitting to his involvement in Aaron's death.

Bies was indicted on one count of aggravated murder, R.C. 2903.01, with three death penalty specifications: one under R.C. 2929.04(A)(3) (offense committed to escape detection for attempted rape or kidnapping) and two under R.C. 2929.04(A)(7) (felony-murder based on underlying felonies of kidnapping and attempted rape). Bies was also indicted on the separate charges of attempted rape (R.C. 2907.02 and 2923.02) and kidnapping (R.C. 2905.01). At the conclusion of the guilt phase, the jury found Bies guilty on all counts and specifications.

At his sentencing hearing, Bies made an unsworn statement. A letter Bies had composed for the purpose of his statement was read by his attorney when Bies had trouble reading it. In the letter, Bies stated that this was the first time he had ever been in court, and asked for mercy and a life sentence. Bies also called Dr. Donna E. Winter, a clinical psychologist, to testify on his behalf.

Winter reviewed an evaluation made of Bies when he was three years old, in which he was characterized as being "violent and uncontrollable." Hospital records of Bies indicated that he was abused during his childhood, and that his upbringing was chaotic, neglectful and violent. Between the ages of five and thirteen, Bies had made several suicide attempts or threats. Bies was too disruptive for public school, so he was placed in several different

special schools. Winter believed that Bies is still a very impulsive person, who at times cannot control his anger and becomes hostile. Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded. Although Winter described Bies as a "very dense individual" lacking common sense, she conceded that everyone who evaluated Bies, including herself, concluded that Bies knew right from wrong at the time of the murder.

The jury recommended the death penalty, and the trial court imposed a capital sentence. The court also imposed consecutive terms of imprisonment for the attempted rape and kidnapping.

Upon appeal, the First District Court of Appeals affirmed the convictions and sentence of death.

This cause is now before this court upon an appeal as of right.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *William E. Breyer*, Assistant Prosecuting Attorney, for appellee.

Deardorff & Haas, *Timothy J. Deardorff* and *Loren S. Haas*, for appellant.

Francis E. Sweeney, Sr., J. Appellant raises twenty-four propositions of law for our review. (See Appendix.) Many of these propositions either have not been preserved or have already been rejected in prior case law. Pursuant to R.C. 2929.05, we will not

address and discuss, in opinion form, each proposition of law. See, *e.g.*, *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, syllabus; *State v. Scudder* (1994), 71 Ohio St.3d 263, 643 N.E.2d 524; *State v. Simko* (1994), 71 Ohio St.3d 483, 644 N.E.2d 345. However, we have fully reviewed the record and passed upon each proposition prior to reaching our decision. We have also independently assessed the evidence relating to the death sentence, balanced the aggravating circumstances against the mitigating factors, and reviewed the proportionality of the sentence to sentences imposed in similar cases. As a result, we affirm appellant's convictions and death sentence.

PRETRIAL MOTIONS

Motion to Suppress (XVI)

In Proposition of Law XVI, Bies argues that the trial court erred in overruling his motion to suppress his statements made to police officers. Bies contends that he lacked the mental capacity to waive his *Miranda* rights, and that under the totality of the circumstances, his confession was involuntary.

A review of the officers' testimony and the taped statements of Bies reveals that he was advised of and waived his *Miranda* rights before each interview with the police. Moreover, at no time during the motion to suppress hearing did defense counsel attempt to establish that Bies lacked the mental capacity to voluntarily waive his *Miranda* rights. As noted in *State v. Hill* (1992), 64 Ohio St.3d 313, 318, 595 N.E.2d 884, 890, while the state must prove voluntariness by a preponderance of the evidence, a low mental aptitude of the interrogee is

not enough by itself to show police overreaching. Following *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, this court recognized that evidence of police coercion or overreaching is necessary for a finding of involuntariness. *Hill, supra.* None of the interviews of Bies indicates police coercion, threats, mistreatment or physical deprivation. The questioning of Bies was neither prolonged nor intense. Under the totality of circumstances test of *State v. Smith* (1991), 61 Ohio St.3d 284, 288, 574 N.E.2d 510, 515, the trial court did not err in overruling Bies's motion to suppress.

Accordingly, Proposition of Law XVI is rejected.

Change of Venue (XVII)

In Proposition of Law XVII, Bies contends that the trial court erred in overruling his motion for change of venue based on pretrial publicity. Bies asserts that the voir dire record amply indicates that most prospective jurors had some familiarity with the murder of Aaron Raines.

In reviewing a ruling on a change of venue motion, the crucial issue is whether the trial court's refusal to change venue violated the defendant's fair trial rights. *State v. Lundgren* (1995), 73 Ohio St.3d 474, 479, 653 N.E.2d 304, 313. However, the denial of a motion for a change of venue will not be disturbed absent a clear showing of an abuse of discretion by the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239, 250, 15 OBR 379, 388-389, 473 N.E.2d 768, 780.

A review of the voir dire indicates that most

prospective jurors had been exposed to pretrial publicity about the murder. Of those jurors who had heard of the crime, however, most remembered very little and all stated that they would judge Bies solely on the law and evidence presented at trial. Thus, the examination of the jurors during voir dire afforded the best indication that prejudice toward Bies did not exist in the community. See *State v. Fox* (1994), 69 Ohio St.3d 183, 189, 631 N.E.2d 124, 130. There was no reasonable likelihood of prejudice arising out of the pretrial publicity in this case. *State v. Fairbanks* (1972), 32 Ohio St.2d 34, 61 O.O.2d 241, 289 N.E.2d 352, paragraph one of the syllabus.

Since Bies's right to a fair trial was not violated, he cannot show that the trial court abused its discretion in rejecting his motion for a change of venue. We overrule this proposition of law.

GUILT PHASE

Sufficiency of the Evidence (XXI, XXII)

In Propositions of Law XXI and XXII, Bies claims the trial court erred in denying his Crim.R. 29 motions because his convictions for attempted rape and kidnapping were not supported by sufficient evidence and were against the manifest weight of the evidence.

When a defendant challenges the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis *sic.*) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573; *State v. Campbell* (1994),

69 Ohio St.3d 38, 46, 630 N.E.2d 339, 348.

In light of the testimony at trial, we find these propositions to be meritless. Bies admitted to the police officers who took his statements that both he and Gumm wanted to engage in sexual acts with Aaron, and that is why they lured the boy into the abandoned buildings. Bies further admitted that Gumm attempted intercourse with Aaron, but Aaron screamed and resisted. As pointed out by the court of appeals below, Bies was at least a complicitor to both offenses and, under R.C. 2923.03(F), a complicitor "shall be prosecuted and punished as if he were a principal offender." As to Bies's complaint about the manifest weight of the evidence, a thorough review of the record convinces us that his guilt was established beyond a reasonable doubt.

Accordingly, Propositions of Law XXI and XXII are not well taken.

PENALTY PHASE
Sentencing Opinion (VI)

In Proposition of Law VI, Bies asserts that in its sentencing opinion, the trial court considered the nature and circumstances of the offense as nonstatutory aggravating circumstances. In addition, Bies contends that the trial court gave insufficient consideration to valid mitigating factors, and that it considered the nonexistence of some statutory mitigating factors as nonstatutory aggravating circumstances. In particular, Bies points to the trial court's review of the "catch-all" mitigating factor of R.C. 2929.04(B)(7), where the court stated:

"The defendant's background is sad, but is not

sufficient mitigation. Far more persuasive were the innocence of the victim and the brutality of the crime."

While a court cannot consider the nature and circumstances of an offense as a nonstatutory aggravating circumstance, *State v. Lott* (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293, 304, a review of the sentencing opinion does not support Bies's assertion. Here, the trial court relied upon and cited the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances outweighed the mitigating factors. See *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus.

However, even if any of Bies's complaints are valid, our independent review will cure any errors or omissions. See, *e.g.*, *Lott*, *supra*, 51 Ohio St.3d at 170, 555 N.E.2d at 304. Therefore, Proposition of Law VI is rejected.

Consecutive Sentencing (VIII)

In Proposition of Law VIII, Bies submits that a trial court cannot legally impose a term of imprisonment to be served consecutively to a death sentence. Notwithstanding the fact that this issue is waived for failing to raise it below, this court rejected the same argument in *Campbell*, *supra*, 69 Ohio St.3d at 52, 630 N.E.2d at 352. There, this court found that the prison sentence was rendered moot by the imposition of the death sentence. Accordingly, Proposition of Law VIII is overruled.

Prosecutorial Misconduct (XI)

In Proposition of Law XI, Bies argues that the cumulative effect of instances of prosecutorial misconduct during closing argument at the penalty phase caused the jury to impose a harsher sentence than it might have otherwise imposed.

Bies complains first that the prosecutor, over defense objection, improperly appealed to the jurors' sense of morality when he commented that Bies's mother did not testify during the mitigation hearing. However, prosecutorial comment pertaining to the fact that a witness, other than the accused, did not testify, is not improper. See *State v. Williams* (1986), 23 Ohio St.3d 16, 20, 23 OBR 13, 17, 490 N.E.2d 906, 911; *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193, 616 N.E.2d 909, 916.

Bies further asserts prosecutorial misconduct with respect to the following comments:

"He [Bies] was disrupting class as early as kindergarten. He was expelled from public schools and placed in therapeutic schools which deal with severe behavior problems."

"*** [W]ith respect to everyone involved in the arguments in this case, I would submit that tears of sympathy are very much misdirected here. They are very much misdirected."

"I submit to you, ladies and gentlemen, that Michael Bies is a parent's worst nightmare."

"You've seen the pictures. What happens to a little 10 year old 85 pound 4-1/2 foot boy with a cast

on his foot? You saw what happened to him when he doesn't comply with what Michael Bies wants him to do.

"He takes a pipe to his head, trying to force him to do this. He breaks his jaw. He breaks his teeth."

None of the foregoing comments was objected to and, thus, all but plain error is waived. *State v. Johnson* (1989), 46 Ohio St.3d 96, 103, 545 N.E.2d 636, 643. These comments were not abusive, but fit within the creative latitude permitted both parties during closing argument. *State v. Brown* (1988), 38 Ohio St.3d 305, 317, 528 N.E.2d 523, 538. Even assuming that these comments were improper, they did not prejudicially affect the substantial rights of defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14 OBR 317, 570 N.E.2d 883. Nothing suggests that "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. Accordingly, Proposition of Law XI is overruled.

INDEPENDENT ASSESSMENT OF SENTENCE

Pursuant to our duties imposed by R.C. 2929.05(A), we now independently review the death penalty sentence for appropriateness and proportionality.

The evidence establishes, beyond a reasonable doubt, that Bies committed the aggravating circumstances of murdering Aaron Raines for the purpose of escaping detection, apprehension and trial for other offenses, *i.e.*, attempted rape and

kidnapping, and that during these offenses, Bies was either the principal offender in the aggravated murder or he committed it with prior calculation and design. R.C. 2929.04(A)(3) and (7).

As to possible mitigating factors, nothing in the nature and circumstances of the offense appears mitigating. Bies accompanied Gumm when Gumm lured ten-year-old Aaron Raines into the abandoned buildings under the ruse that he would pay Aaron for help in stripping scrap metal from the buildings. Bies told police that both he and Gumm went into the buildings in order to engage in sexual acts with Aaron. When Aaron refused Gumm's advances, Bies hit Aaron with a board. Aaron was carried to the basement of the second building, where Bies and Gumm brutalized him with an assortment of weapons. Bies admitted to police his participation in the murder after first claiming to be a mere bystander. After severely beating Aaron, the men left Aaron to die.

Bies's history and background provide some mitigating features. Dr. Winter testified that Bies was born to a teenage mother in an environment of neglect and abuse. Bies's father was an alcoholic who physically abused Bies's mother before he abandoned the family. At the age of nearly four, Bies underwent a complete medical and psychological evaluation, since he was diagnosed as "violent and uncontrollable." Throughout his childhood, Bies endured several medical and psychiatric hospitalizations, some of which were attributable to suicide attempts. Bies was expelled from public school because of his disruptive behavior, and was thereafter placed in a therapeutic school for a severe behavior handicap. The psychiatric diagnoses for

Bies included attention deficit/hyperactivity disorder, adjustment disorder with depression, and adjustment disorder with mixed disturbance of emotions and conduct. Winter found that Bies was mildly to borderline mentally retarded, and suffering from a borderline personality disorder. Overall, Winter characterized Bies as "a very dense individual." Nevertheless, Winter found that Bies knew right from wrong at the time of the murder.

With respect to the relevant mitigating factors in R.C. 2929.04(B), factor (4), youth of the offender, is entitled to appropriate weight since Bies was twenty years old at the time of the offense. However, this court seldom accords such factor great weight in mitigation. See *Hill*, *supra*, 64 Ohio St.3d at 335, 595 N.E.2d at 901.

In spite of a pending charge from Indiana of receiving stolen property at the time of his arrest, Bies's lack of a significant criminal record (factor 5) is entitled to some weight. See *State v. Brewer* (1990), 48 Ohio St.3d 50, 64, 549 N.E.2d 491, 505. Under factor (7), Bies's personality disorder and mild to borderline mental retardation merit some weight in mitigation. See *State v. Davis* (1992), 63 Ohio St.3d 44, 51, 584 N.E.2d 1192, 1198. However, they do not rise to the level of a "mental disease or defect" under R.C. 2929.04(B)(3). See *State v. Seiber* (1990), 56 Ohio St.3d 4, 9, 564 N.E.2d 408, 415. In addition, Bies's violent and unstable family environment is entitled to some, but very little, weight in mitigation. *State v. Montgomery* (1991), 61 Ohio St.3d 410, 419, 575 N.E.2d 167, 174. None of the other statutory mitigating factors is relevant.

Upon independent weighing, the aggravating

circumstances outweigh the mitigating factors beyond a reasonable doubt. The totality of evidence and circumstances portray a heinous and brutal crime that shocks the senses. A small ten-year-old boy who was afraid of the dark and who had problems walking was tricked into going into two abandoned buildings to earn some money. Once inside, Bies and Gumm made Aaron aware of their sexual intentions and Aaron resisted. But he was not allowed to leave. This clearly constituted kidnapping under R.C. 2905.01. Aaron was then dragged over to another building against his will where the attempted rape took place. After Aaron refused to accede to the sexual desires of his abductors, he was brutally murdered. Bies's participation in these crimes merits the capital penalty to which he was sentenced.

The death penalty imposed in this case is both appropriate and proportionate when compared with similar capital cases where murder was combined with kidnapping. See *Fox, supra*, 69 Ohio St.3d 183, 631 N.E.2d 124; *State v. Joseph* (1995), 73 Ohio St.3d 450, 653 N.E.2d 285; and *State v. Spirko* (1991), 59 Ohio St.3d 1, 570 N.E.2d 229. The penalty is also appropriate and proportionate when compared with capital cases combining murder and attempted rape. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237; and *State v. Scudder, supra*, 71 Ohio St.3d 263, 643 N.E.2d 524. Moreover, the penalty is appropriate and proportionate when compared to the capital case of Bies's accomplice. See *State v. Gumm* (1995), 73 Ohio St.3d 413, 653 N.E.2d 253.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, PFEIFER and COOK, JJ., concur.

APPENDIX

"Proposition of Law I[:] Appellant was deprived of his rights of due process, to a fair trial and against cruel and unusual punishment under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, and the Eighth Amendment and Article I, Section 9 of the Ohio Constitution, respectively, when the trial court refused to instruct the jury on the lesser included offense of involuntary manslaughter.

"Proposition of Law II[:] In an aggravated murder case, the state must prove that the defendant specifically intended to cause the death of another. Jury instructions on causation which state that the defendant need not foresee a particular injury to a specific person and that the defendant is responsible for causing any foreseeable result which flows from an unlawful event are incompatible with the specific intent to cause the death of another which is required for aggravated murder. Such instructions relieve the state of its burden of proof on this essential element and violate the Eighth and Fourteenth Amendments to the United States Constitution.

"Proposition of Law III[:] Expert scientific testimony should not be admitted if it is not relevant,

does not assist the trier of fact and has a minimal probative value which is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury. *State v. Williams*, 4 Ohio St.3d 53 [4 OBR 144, 446 N.E.2d 444] (1983), followed.

Proposition of Law IV[:] Needlessly cumulative evidence should not be admitted. Allowing the prosecution to play two tape recordings and then allowing the state to provide the jury with transcripts of the two exhibits, both during testimony and in the jury room, is unduly repetitive and unfairly emphasizes the contents of the recordings.

"Proposition of Law V[:] A capital defendant is denied his Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, due process and a reliable determination of his guilt and sentence when gruesome, prejudicial and cumulative photographs are admitted into evidence even though their prejudicial effect outweighs their probative value.

"Proposition of Law VI[:] A trial court commits prejudicial error by basing its decision to impose the death sentence upon the nonstatutory aggravating factor of the nature and circumstances of the offense, by giving insufficient consideration to valid mitigating factors, and by considering the nonexistence of some statutory mitigating factors as nonstatutory aggravating factors. These violated appellant Michael Bies' constitutional right to reliability in the imposition of a death sentence upon him.

"Proposition of Law VII[:] Penalty phase jury instructions which relieve the state of its burden of

proof and which effectively mandate a death verdict offend the Eighth and Fourteenth Amendments and require reversal of the death sentence.

"Proposition of Law VIII[:] Pursuant to R.C. 2929.41 a term of imprisonment can be made consecutive only to another term of imprisonment. A death sentence is not a term of imprisonment. Therefore, a [trial] court cannot legally impose a term of imprisonment to be served consecutively to a sentence of death.

"Proposition of Law IX[:] Appellant Bies' right to an impartial jury under the Sixth Amendment to the United States Constitution and Article I, Section 5 of the Ohio Constitution and to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution, were violated because the trial court abused its discretion when it refused to grant appellant's motion for individual sequestered voir dire.

"Proposition of Law X[:] The prosecution exceeds proper bounds for voir dire in a capital case when it obtains [jurors'] personal commitment to a death verdict in the particular case before them, creates a presumption in favor of a death sentence and diminishes [jurors'] sense of responsibility for a death verdict.

"Proposition of Law XI[:] A trial court may not allow the prosecutor to appeal [to] the passions and prejudices of the jury at the penalty phase of the trial. This violates the accused's rights under the Sixth and Fourteenth Amendments to the United States Constitution and his concomitant rights under

Article I, Section 10 of the Ohio Constitution.

"Proposition of Law XII[:] The trial court's instructions to the jury on the definition of reasonable doubt allowed the jurors to return convictions based on a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment.

"Proposition of Law XIII[:] The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution establish the requirements for a valid death penalty scheme. Ohio Revised Code, Section[s] 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed constitutional requirements and are unconstitutional, both on their face and as applied to appellant Michael Bies.

"Proposition of Law XIV[:] The trial court's instructions to the jury that its sentencing verdict was only a recommendation diminished the jury's responsibility for its verdict and rendered appellant Bies' death sentence unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 5, 9, 10, and 16 of the Ohio Constitution.

"Proposition of Law XV[:] A trial court commits plain error by submitting to the jury a verdict form as [*sic*, at] the sentencing phase stating that the verdict of the jury was merely a 'recommendation.'

"Proposition of Law XVI[:] A trial court errs to the prejudice of the appellant in overruling the motion to suppress from evidence statements allegedly made by appellant after he was taken into custody and before he was provided with the advice, assistance, and representation of counsel, which statements were used as evidence in chief against the appellant at his trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under the Constitution of Ohio, Article I, Section 10.

"Proposition of Law XVII[:] A trial court errs denying appellant's motion for a change of venue when there is a reasonable likelihood that prejudicial news prior to trial will prevent a new [*sic*, fair?] trial.

"Proposition of Law XVIII[:] A trial court may not impose the death sentence when the jury which convicted the appellant and recommended the death sentence was improperly constituted in violation of the appellant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the United States, and under the Bill of Rights of the Ohio Constitution, in addition to constituting a violation of Ohio statutory law.

"Proposition of Law XIX[:] The trial court erred in overruling the appellant's motion to prohibit death qualification of the jury, which resulted in a jury that did not represent a fair cross-section of the community.

"Proposition of Law XX[:] It is reversible error for the trial court to instruct the jury that a defendant's purpose to kill can be presumed from the use of a weapon. That presumption relieves the state

of its burden of proof as to an essential element of the crime charged in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

"Proposition of Law XXI[:] A trial court errs to the substantial prejudice of appellant Bies and in violation of his rights to due process of law under the United States and Ohio Constitutions by denying appellant's Rule 29 motions, and by entering judgments of conviction on the counts of attempted rape and kidnapping, for the reason that there was insufficient evidence produced to support convictions for those offenses.

"Proposition of Law XXII[:] The judgments of conviction for attempted rape and kidnapping are contrary to the manifest weight of the evidence.

"Proposition of Law XXIII[:] The judgment of the trial court, as well as the jury, that the aggravating factors of which appellant was convicted outweighed the mitigating factors presented by the defense is contrary to the manifest weight of the evidence and to the constitutional right to due process of law, and to be free from cruel and unusual punishment under the Eight[h] Amendment and Article I, Section 9 of the Ohio Constitution.

"Proposition of Law XXIV[:] The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 10 and 16, Article I of the Ohio Constitution and Ohio Revised Code, Section 2929.05 guarantee a convicted capital defendant a fair and impartial review of his death sentence.

The statutorily mandated proportionality process being employed in Ohio does not comport with this constitutional requirement and thus is fatally flawed."

OPPOSITION BRIEF

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No. 08-598

IN THE
Supreme Court of the United States

DAVID BOBBY, WARDEN
Petitioner,

v.

MICHAEL BIES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RANDALL L. PORTER
(*Counsel of Record*)
Office of the Ohio
Public Defender
8 E. Long Street, 11th Floor
Columbus, OH 43215-2998

JOHN H. BLUME
KEIR M. WEYBLE
SHERI L. JOHNSON
Cornell LawSchool
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

S. SCOTT HAYNES
Hallowes, Allen & Haynes
6445 E. Livingston Avenue
Reynoldsburg, OH 43068
Counsel for Respondent

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RESPONDENT'S STATEMENT OF THE CASE

Because Petitioner has failed to provide this Court with the evidence of Bies' mental retardation, or to acknowledge its multiple concessions that Bies has mental retardation, or to inform this Court of additional state court findings that Bies has mental retardation, Respondent will begin with a recitation of the relevant facts.

I. The Evidence of Bies' Mental Retardation.

Michael Bies was born literally black, due to a lack of oxygen. Before age three, developmental delays, intellectual deficiency, speech difficulties, and hearing loss were apparent. (Clifton Aff. ¶ 10; Dr. Donna Winter, "Mitigation Report," at 2-3, 7 (10/10/92)). A pediatrician referred three year old Bies to the Dysfunctional Child Center of the Mental Reese Hospital and Medical Center, where tests uncovered left hemisphere brain dysfunction. (Clifton Aff. ¶ 10). The doctors advised Bies' mother that he should be institutionalized, but she refused to do so. *Id.*

Because of Bies' developmental and intellectual difficulties, he attended "therapeutic schools," comprised only of profoundly mentally and emotionally disturbed children. (Mucci Aff. ¶ 2; Hookansan Aff. ¶ 3; Dr. Winter, "Mitigation Report," at 5; Dr. Eileen Myers, Illinois Bureau of Disability Adjudication Services, at 1 (2/6/85)). Bies' mental

disabilities prevented him from adequately functioning even in this environment, and he was consequently referred to the Chicago Reed Hospital. Mental health experts there again recommended that Bies be institutionalized. (Hookansan Aff. ¶ 11).

Long before Bies' trial, a number of state agencies determined that Bies was a person with mental retardation. The Social Security Administration, for example, diagnosed him with mental retardation when he was ten years old. (Social Security Administration, Disability Determination and Transmittal (3/9/83)). When Bies was eleven, the Social Security Administration again found that he was a person with mental retardation. (Social Security Administration, Disability Determination and Transmittal (11/27/84)). At age twelve, the Illinois Bureau of Disability Adjudication Services gave Bies a psychological evaluation for children, which revealed that he had a full scale IQ of 50. (Dr. Myers, Illinois Bureau of Disability Adjudication Services, at 2). His vocabulary score at age twelve was in the lowest one percent of the population, and was comparable to that of a seven year old. *Id.* The psychologist performing the evaluation for the state concluded that Bies was "mildly mentally retarded." *Id.*

Bies also underwent multiple psychological evaluations in connection with his trial that resulted in uncontested opinions that he has mental retardation. Dr. Myron Fridman, for example,

concluded that Bies is "marginally functioning [and] mildly mentally retarded." (Dr. Myron Fridman, "NGRI Report," at 3 (9/11/92)). Similarly, Dr. Donna Winter, whose evaluation the Ohio courts expressly relied upon, reached the following conclusions:

> Mild mental retardation to borderline mental retardation (Verbal IQ = 70; Performance IQ = 67; Full Scale IQ = 68); (2) organic brain dysfunction characterized by specific learning disability; and (3) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger.

(Dr. Donna Winter, "NGRI Report," at 6 (9/10/92); *see also* Dr. Winter, "Mitigation Report," at 7). Dr. Winter further concluded that Bies' intelligence was impaired, he was functionally illiterate, he could not think logically, and his mild mental retardation constituted a mental defect under Ohio law. (Dr. Winter, "Mitigation Report," at 6-7; Dr. Winter, "NGRI Report,"at 6).

II. The Prosecutor's Concessions and State Court Findings of Mental Retardation.

A. Trial and direct appeal.

Evidence of Bies' mental retardation was

presented at trial. The proof was such that even the Hamilton County prosecutor conceded in closing argument that Bies' "IQ . . . [is] 68 ... Michael Bies is not intelligent. I think that we can all accept that." (Trial Tr. 1180).

On direct appeal, the issue of whether Bies is mentally retarded was briefed by the State and Bies' counsel, and both the Ohio Court of Appeals and the Ohio Supreme Court made independent findings that Bies' was mentally retarded.[1] The Ohio Court of Appeals' independent review of the record led it to conclude:

> Bies' psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction

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[1]At the time of Bies' direct appeal, Ohio appellate courts were required to "review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate." Ohio Rev. Code §2929.05; *see also* Ohio Rev. Code §2929.04(B) (enumerating aggravating and mitigating factors); *State v. Claytor*, 574 N.E.2d 472, 481 (1991) ("The mitigating factor involving Claytor's undisputed mental illness and the impact it had on his reasoning process should have been accorded more weight").

> characterized by specific learning disabilities . . . [and] are entitled to some weight in mitigation.

State v. Bies, 1994 Ohio App. LEXIS 1304, at *28 (March 30, 1994). Subsequently, the Ohio Supreme Court's own independent review yielded the finding that "Bies' personality disorder and mild to borderline mental retardation merit some weight in mitigation."[2] *State v. Bies*, 658 N.E.2d 754, 761 (1992).

B. State post-conviction proceedings prior to *Atkins*.

Bies filed his first application for state post-conviction relief in 1996. That application included a claim that the execution of a mentally retarded person would constitute cruel and unusual punishment. In response, the State conceded that "[t]he record reveals defendant to be mildly mentally retarded with an IQ of about 69," but asserted that relief should be denied because there was no legal prohibition to executing a person with mental

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[2]Both of these findings of mental retardation were made before the Ohio Supreme Court responded to *Atkins v. Virginia*, 536 U.S. 304 (2002), by formally adopting a standard for mental retardation in *State v. Lott*, 779 N.E.2d 1011 (Oh. 2002). Nevertheless, as the Warden concedes, Dr. Winter's mental retardation diagnosis prior to Bies' trial was rendered using the standard later adopted in *Lott*. *See* Petition at 26 ("Dr. Winter applied the diagnostic method that was later outlined in *Lott*"); *see also Bies v. Bagley*, 519 F.3d 324, 334-35 (6th Cir. 2008).

retardation. Mot. For Judg. Pursuant to O.R.C. 2953.21(c), Court of Common Pleas, Hamilton County, at 16 (11/22/96).

The state post-conviction court's findings and conclusions mirrored the positions taken by the State:

> The defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. As to this claim, the Court makes the following Findings of Fact: (1) The defendant is shown by the record to be *mildly mentally retarded with an IQ of about 69.* The Court makes the following Conclusions of Law: As a matter of law, a mildly mentally retarded defendant may be Punished by execution.

Court of Common Pleas, Hamilton County, Findings of Fact, Conclusions of Law, at 9 (7/22/98) (citations omitted) (emphasis added).

On appeal from the denial of post-conviction relief, the State again conceded that Bies was mentally retarded in its submissions to both the Ohio Court of Appeals and the Ohio Supreme Court. *See* Pl. Brief, Court of Appeals, First Appellate Dist., at 21 (2/9/99) ("The record reveals defendant to be mildly mentally retarded with an IQ of about 69"); Pl. Mem. in Resp., Supreme Court of Ohio, at 2 (9/15/99) (same).

III. The State's Course Reversal in Response to *Atkins*.

This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), was handed down while Bies's second application for post-conviction relief was pending in state court,[3] and his petition for federal habeas corpus relief was pending in the United States District Court for the Southern District of Ohio. Relying on *Atkins*, Bies returned to state court with a third application for post-conviction relief, again asserting that his execution would violate the Eighth Amendment because he is mentally retarded, and adding that the State was collaterally estopped from relitigating the factual issue of his mental retardation.

Ignoring its own earlier concession before the same court (as well as the Ohio Court of Appeals and the Ohio Supreme Court), the State responded to the *Atkins* claim with the contention that "Bies' I.Q. score coupled with his adaptive behavior skills indicate that he is not mentally retarded." *See, e.g.*, Pl. Memo in Opp'n to Def. Mot. For Summ. Judg., State of Ohio, Hamilton County, at 5 (9/8/03). In response to Bies' estoppel argument, the State contended – again without acknowledging its prior concessions or the state court findings – that the

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[3]The claims raised in this second application for state post-conviction relief were not related to the issues now before this Court.

already-settled historical fact of Bies' mental retardation should be re-examined at an evidentiary hearing pursuant to the procedure outlined by the Ohio Supreme Court's decision in *Lott*. *Id.* Citing an inability "to determine whether the experts applied the test [for mental retardation] as laid out by the courts" in *Atkins* and *Lott*, the state post-conviction court denied Bies' motion for summary judgment. *State v. Bies*, Court of Common Pleas, Hamilton County, Ohio, Summary Judgment, at 4, 6 (4/5/04).[4]

IV. Federal Habeas Corpus Proceedings.

Bies returned to federal court challenging the state post-conviction court's determination that the factual question of his mental retardation could (and should) be relitigated. Applying the rule established by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), the district court held that the prior findings of mental retardation constituted determinations of an "ultimate fact" barring further litigation, and that the state court's decision to the contrary was factually and legally unreasonable under *Ashe*. *See Bies v. Bagley*, 2005 U.S. Dist. LEXIS 41032, at *8-9 (Dec. 30, 2005); *see also id.* at *12 (observing that, in light of three prior state court findings that Bies is mentally retarded, the "new procedures for

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[4]As previously noted, the Warden concedes in the petition for writ of certiorari that Dr. Winter used the test for mental retardation subsequently embraced by the Ohio Supreme Court in *Lott*, *supra*.

determining mental retardation . . . [were] immaterial").

On appeal by the Warden, the Sixth Circuit agreed with the district court's determination that relitigation of the settled fact of Bies' mental retardation was barred under *Ashe*'s rule that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Bies v. Bagley*, 519 F.3d 324, 332 (6th Cir. 2008) (quoting *Ashe*, 397 U.S. at 443). The Sixth Circuit supported this conclusion with a detailed analysis of the record developed at trial, the arguments asserted by the parties on direct appeal, the review undertaken and findings rendered by the Ohio courts on direct appeal, and the standard for establishing mental retardation as applied by Dr. Winter prior to trial and later adopted by the Ohio Supreme Court in *Lott*. *Bies*, 519 F.3d at 333-39.

Having determined that the Double Jeopardy Clause barred further litigation of Bies' mental retardation, the Sixth Circuit went on to conclude that habeas relief was authorized under 28 U.S.C. §2254(d)(2) because "[c]lear and convincing evidence ... demonstrate[s] that the Ohio state court based its decision to permit relitigation of [Bies'] mental retardation on *unreasonable determinations of fact*." *Bies*, 519 F.3d at 340.[5] (emphasis added). The court

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[5]The Sixth Circuit's formulation of the standard by which Bies was required to overcome the state court's factual

explained that the state post-conviction court's claims of uncertainty about whether Dr. Winter had applied the mental retardation standard later adopted in *Lott* were "contrary to the record," which showed that *Lott* had adopted the clinical test accepted by the psychological profession, and that Dr. Winter had applied that test herself. *Id.* at 340-41; *see also id.* at 342 ("In light of the overwhelming evidence that Dr. Winter did in fact apply the clinical standard recognized by her own profession, we conclude that clear and convincing evidence demonstrates that the Ohio trial court unreasonably found that Dr. Winter could have applied a different standard"). "Accordingly," the Sixth Circuit held, Bies' "double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact." *Id.* at 342.

REASONS THE WRIT SHOULD BE DENIED

The Warden purports to challenge the Sixth Circuit's conclusion that, under the highly idiosyncratic circumstances of this case, the State of Ohio cannot be afforded another opportunity to litigate the long-resolved, and long ago conceded, factual question of Bies' mental retardation now that

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determination – *i.e.*, requiring Bies to demonstrate by clear and convincing evidence that the state court's factual determinations were unreasonable – combined the requirements of 28 U.S.C. §§2254(e)(1) and (d)(2) in a way rejected by this Court as "too demanding" in *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Nevertheless, the court concluded that Bies satisfied even this demanding standard.

the State has a stronger legal incentive to do so. In mounting this challenge, however, the Warden ignores the grounds upon which the Sixth Circuit actually made its decision, and instead offers a set of arguments bearing, at best, only a tangential relationship to the Sixth Circuit's judgment. As discussed below, the Warden's collection of straw men do not warrant issuance of the writ of certiorari.

I. The Sixth Circuit's Opinion Does Not Raise the AEDPA Concerns the Warden Attempts to Present.

The Warden asserts that, "[u]nder AEDPA, Bies must establish that the Ohio court's decision was 'contrary to' or 'an unreasonable application of' this Court's precedents" in order to establish his entitlement to relief under §2254(d)(1). Petition at 18; *see also id.* at 19 (asserting that §2254(d)(1)'s "unreasonable application" clause "does not apply," and that, "[t]hus, the question is whether the state court's decision was 'contrary to' clearly established federal law ..."). This wilfully overlooks the AEDPA analysis actually undertaken by the Sixth Circuit which, on its face, does not even implicate, let alone violate, §2254(d)(1).

Section 2254(d) has two subdivisions: (d)(1) and (d)(2).[6] Subdivision (d)(1) permits habeas relief

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[6]The statute provides as follows:

(d) An application for a writ of habeas corpus on

where the state court's decision on the merits of a claim "was contrary to, or involved an unreasonable application of, clearly established federal law." Subdivision (d)(2) permits relief where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." Because these subdivisions are written in the disjunctive, the statute permits relief on a meritorious constitutional claim where *either* (d)(1) *or* (d)(2) is satisfied. *See Miller-El v. Dretke*, 545 U.S. 231 (2005) (finding relief authorized under §2254(d)(2) without mentioning §2254(d)(1)); *Rice v. Collins*, 546 U.S. 333, 342 (2006) (recognizing for §2254(d) purposes that "[t]he question whether a state court errs in determining the facts is a different question from whether it errs in applying the law"); *Lewis v. Ortiz*,

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> behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

2007 WL 1467162, at *17 n.7 (D.N.J. 2007) ("[A] petitioner who satisfies §§ 2254(d)(2) and 2254(e)(1) need not also satisfy the unreasonable application clause of § 2254(d)(1) ...") (citations omitted).

In this case, the Sixth Circuit affirmed the grant of habeas relief under §2254(d)(2), not §2254(d)(1). As the Sixth Circuit recognized, the state court's decision turned on its own view that the record did not reveal whether Dr. Winter's mental retardation diagnosis was rendered using the test later adopted in *Lott*, and on the state court's beliefs that Dr. Winter's testimony contained "no analysis," and that her diagnosis "'appears to be based primarily on the IQ test.'" *Bies*, 519 F.3d at 340-41. Pursuant to §2254(d)(2), the Sixth Circuit undertook a detailed examination of the reasonableness of the state court's factual determinations "in light of the evidence presented in the state court proceeding," and concluded as follows:

> The Ohio trial court's determination that Dr. Winter may not have applied the clinical definition of mental retardation was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). As the Supreme Court of Ohio followed Dr. Winter's testimony in its 1996 finding that Petitioner is mentally retarded, the Ohio trial court's unreasonable determination of fact led to its equally

> unreasonable determination that the 1996 finding relied on a different method than the one described in *Lott*. Accordingly, we hold that Petitioner's double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact.

Bies, 519 F.3d at 341-42 (internal citation omitted).[7]

Given the Sixth Circuit's clear and exclusive reliance upon §2254(d)(2), the Warden's invocations of §2254(d)(1) are irrelevant. Moreover, and more importantly, the Warden's failure to challenge the Sixth Circuit's selection or application of §2254(d)(2) leaves that portion of the judgment undisturbed and makes this case a poor candidate for review on certiorari. *See, e.g., Stevens v. Marks,* 383 U.S. 234, 246-47 (1966) (Harlan, J. concurring and dissenting) (stating that the Court's reversal of the judgment below was on grounds never properly set forth by the petition and not within the limited issues for certiorari).

II. The Warden's Insistence That Relitigation Remains Available

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[7]The unreasonableness of the state court's factual determination is underscored by the Warden's concession on p. 27 of the petition that Dr. Winter used the appropriate clinical definition of mental retardation in concluding that Bies is a person with mental retardation.

Because Bies' Death Sentence Was Affirmed Before this Court's Decision in *Atkins* Ignores the Theory under Which the Sixth Circuit Actually Resolved the Double Jeopardy Issue.

The Warden argues at length that the State cannot be barred from relitigating Bies' mental retardation because no judge or jury entered an "acquittal" of the death penalty in this case. *See* Petition at 12-18. Like the §2254(d)(1) arguments discussed above, the Warden's "acquittal" theory simply argues past the Sixth Circuit's decision.

It is true that a formal acquittal by a judge or jury triggers the Double Jeopardy Clause. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101, 120 (2003) ("The standard way for a defendant to secure a final judgment in her favor is to gain an acquittal"). However, contrary to the Warden's position, formal acquittal is not the only trigger. As this Court recognized nearly four decades ago, the rule of collateral estoppel is also "embodied in the Fifth Amendment guarantee against double jeopardy," such that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).[8]

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[8]The Double Jeopardy Clause also extends to bar retrial after a mistrial declared in the absence of manifest necessity. *See,*

Having recognized that Bies' mental retardation is an "ultimate fact" in light of the categorical exclusion established by *Atkins*, the Sixth Circuit rightly selected the analysis prescribed by *Ashe* for Bies' double jeopardy claim. The Warden offers no argument either that the *Ashe* rule should not have been applied, or that the Sixth Circuit somehow misapplied it. Instead, the Warden simply proceeds as if *Ashe* does not exist. Indeed, although *Ashe* figures prominently in the Sixth Circuit's opinion, the Warden's petition cites it only (indirectly) once. Petition at 22.

Once it is acknowledged that collateral estoppel is "an ingredient of the Fifth Amendment guarantee against double jeopardy," it becomes clear – as it did for the Sixth Circuit – that *Ashe* provides the appropriate framework for the circumstances of

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e.g., *Sattazahn*, 537 U.S. at 120-21; *United States v. Scott*, 437 U.S. 82, 94 (1978). The range of circumstances to which the Clause applies reflects the range of interests it was designed to protect. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)) ("The Clause ... guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty'"); *United States v. Jorn*, 400 U.S. 470, 479 (1971) ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws").

this case. As *Ashe* recognized, the acquittal requirement should not be applied in a "technically restrictive" way, but rather "with realism and rationality." *Ashe*, 397 U.S. at 444. In *Ashe* itself, realism and rationality demanded recognition of the fact that although the defendant had never been "acquitted" of robbing the second victim, the jury's verdict at an earlier trial on a different charge necessarily included a factual finding that was inconsistent with the defendant's conviction for the second victim's robbery.

The formal acquittal requirement insisted upon by the Warden is a poor fit for Bies' case for the same reasons it was a poor fit in *Ashe*. Although the Ohio Supreme Court's proportionality analysis ultimately led to a general conclusion that the aggravating circumstances outweighed the mitigating factors, the collateral estoppel inquiry does not end there, for the issue the Warden seeks to relitigate is "identical" to an issue already litigated and resolved in Bies' case. Thus, as in *Ashe*, the question here is not whether Bies was "acquitted" of an offense (or sentence) in an earlier proceeding, but whether resolution of "an issue of ultimate fact" in an earlier proceeding involving the same parties bars relitigation of that issue. *Id.* at 443. It does. *See Taylor v. Sturgell*, 128 S.Ct. 2161, 2171 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)) ("Issue preclusion ... bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the

context of a different claim.").

Here, there is no question that the "ultimate fact" of Bies' mental retardation has already been resolved. The Ohio Court of Appeals on direct review found as follows:

> Bies psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction characterized by specific learning disabilities . . . [and] are entitled to some weight in mitigation.

State v. Bies, 1994 Ohio App. LEXIS 1304, at *28 (March 30, 1994). The Ohio Supreme Court's independent review likewise concluded that "Bies' personality disorder and mild to borderline mental retardation merit some weight in mitigation." *State v. Bies*, 658 N.E.2d 754, 761 (1992). And the first state post-conviction court made a "[f]inding[] of fact" that Bies "is shown by the record to be mildly mentally retarded with an IQ of about 69." Court of Common Pleas, Hamilton County, Findings of Fact, Conclusions of Law, at 9 (7/22/98) (citations omitted).

In addition to the three state court findings, the State has also conceded on no fewer than three

occasions that Bies is mentally retarded.[9] At trial, the Hamilton County prosecutor's closing statement acknowledged that Bies' "IQ ... [is] 68 ... Michael Bies is not intelligent. I think that we can all accept that." (Trial Tr. 1180). In opposing Bies' first application for state post-conviction relief, the State admitted that the "record reveals defendant to be mildly mentally retarded with an IQ of about 69." Mot. For Judg. Pursuant to O.R.C. 2953.21(c), Court of Common Pleas, Hamilton County, at 16 (11/22/96). And in subsequent submissions to the Ohio Court of Appeals and the Ohio Supreme Court, the State again conceded that the "record reveals defendant to be mildly mentally retarded with an IQ of about 69." Pl. Brief, Court of Appeals, First Appellate Dist., at 21 (2/9/99); Pl. Mem. in Resp., Supreme Court of

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[9]This Court has recognized that a party is precluded from assuming a certain position in a legal proceeding after it has earlier advocated a contrary position when (1) the party's later position is clearly inconsistent with its earlier position; (2) the party has succeeded in persuading a court to accept that party's earlier position; and, (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also In re Smith*, 285 F.3d 6 (D.C. Cir. 2002) (citing *New Hampshire*, and noting that the government would later be bound to support petitioner's claim for relief, where it had previously argued that applicable law should permit petitioner to raise and prevail upon his claim that his conviction was no longer valid); *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) (estopping the government from "represent[ing] in federal court the opposite of what it represented to the state court when it succeeded in defeating [petitioner's] claim . . . [and] reversing its position in order to suit its current objectives").

Ohio, at 2 (9/15/99).

To permit the relitigation sought by the Warden in the face of multiple state court findings and multiple concessions by the State itself would offend the interests protected by the Double Jeopardy Clause just as surely as did the second trial reviewed in *Ashe*. Bies has already endured the burden of multiple clinical evaluations, a trial on guilt and sentencing, and multiple steps of direct and collateral review, all of which consistently yielded findings rendering him categorically ineligible for a sentence of death. Reopening the issue of mental retardation now, at the request of a party which participated in all of those prior proceedings, would succeed only in providing the State with an opportunity to further pursue a wrongful execution. *Cf. Green*, 355 U.S. at 187-88 (Double Jeopardy Clause prevents relitigation in part to protect against the possibility of convicting an innocent person at a subsequent proceeding). The Sixth Circuit was therefore correct to conclude under *Ashe* that further litigation of Bies' mental retardation is barred. The Warden's petition – which neither acknowledges nor attacks the Sixth Circuit's *Ashe* analysis – provides no basis for overturning that holding on certiorari.

III. The Warden's Assertion That the Sixth Circuit "Misapplied the Rules of Collateral Estoppel" Is Simply a Request for Error Correction.

The Warden attacks the Sixth Circuit's collateral estoppel analysis in two ways, neither of which warrants review by the Court. First, the Warden contends that the Ohio Supreme Court's pre-*Atkins* finding of mental retardation is not the same as a finding of "retardation under the Eighth Amendment." Petition at 27; *see also id.* at 24 (challenging validity of prior mental retardation determinations because "*Atkins* and *Lott* had not yet been decided at the time").[10] This simply conflates the factual determination that Bies is mentally retarded, which has not changed, with the legal consequence of that determination, which changed with *Atkins*. As this Court reiterated just last Term, a prior factual determination retains its preclusive effect "even if the issue recurs in the context of a different claim." *Taylor*, 128 S.Ct. at 2171.

The Warden's second disagreement with the Sixth Circuit's collateral estoppel holding is that Bies' finding of mental retardation was "not necessary" to the Ohio Supreme Court's decision. Petition at 27. The Warden does not suggest that

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[10]The Warden further proposes "*de novo* fact-finding, reliance on professional evaluations, taking expert testimony, and issuing a written opinion." *Id.* (citations omitted). Those things have already been done. Dr. Winter's diagnosis of mental retardation was explained in fifty six pages of testimony, and that testimony formed the basis of two state appellate court findings and a subsequent finding by the state post-conviction court. Those findings resolved "an issue of ultimate fact," and the collateral estoppel principles incorporated in the Double Jeopardy Clause prohibit relitigation. *Ashe*, 397 U.S. at 443.

the Ohio Supreme Court would not have been obligated to make a finding on mental retardation (and all other aggravating and mitigating factors) in order to perform the review mandated by statute; in fact, the Warden effectively concedes that such findings were necessary. *See* Petition at 28. Instead, the Warden argues that Ohio's sentencing scheme discounts characteristics of the defendant proffered as mitigating unless they are accompanied by proof of a "specific link ... to [the defendant's] crime." *Id.* This characterization of Ohio's appellate review in capital cases does not square with the Ohio Supreme Court's statement in this case that Bies' "mild to borderline mental retardation merit[s] some weight in mitigation."[11] *Bies,* 658 N.E.2d at 761. Regardless

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[11]As the Warden describes it, appellate review in Ohio is incompatible with this Court's rejection of a "nexus" requirement for establishing the "constitutional relevance" of mitigating evidence in *Tennard v. Dretke,* 542 U.S. 274, 286-87 (2004). As *Tennard* explained, mental retardation is an "inherently mitigating" factor, regardless of any nexus between that condition and the defendant's crime. *Id.* at 287.

Moreover, even if the "nexus" argument did not do the Warden more harm than good under *Tennard,* it would still suffer for ignoring the distinction between the fact of Bies' mental retardation and the ways in which that fact could be accorded weight in mitigation under Ohio law. While some evidence of a link between the offense and mental retardation may be necessary in order to fall within Ohio Rev. Code §2929.04(B)(3)'s "*because of* mental disease or defect" mitigating factor, no such link is required before giving mitigating weight to mental retardation under Ohio Rev. Code §2929.04 (B)(7) (italics added). *See Bies,* 658 N.E.2d at 761 (citations omitted); *see also State v. Fox,* 631 N.E.2d 124, 131-32 (1994) (defendant's personality disorder was

of which interpretation is correct, however, the Warden has conceded that the mental retardation finding was a necessary ingredient of the Ohio Supreme Court's review of Bies' death sentence.

Finally, and more fundamentally, the Warden's petition contains nothing to suggest that this case presents an issue of national significance. While the petition asserts that the holding below could somehow affect other cases involving "capital defendants who introduced evidence of their limited intellectual functioning in pre-*Atkins* penalty-phase proceedings," Petition at 32, it points to no other cases actually in this posture. The Warden insists that the "Sixth Circuit's ruling should be corrected," but error correction – particularly under circumstances as idiosyncratic and unlikely to recur as those present in this case – is an inadequate basis for the exercise of this Court's certiorari jurisdiction. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969). Furthermore, as the multiple state court findings and the multiple State concessions demonstrate, even a reversal of the Sixth Circuit's decision would not result in error correction, for relitigation of Bies' mental retardation would inevitably result in confirmation of the fact that Bies is mentally retarded and categorically ineligible for the death penalty. *Cf. Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("What we have

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not mitigating under Ohio Rev. Code §2929.04(B)(3), which requires causal link between disorder and criminality, but could still be mitigating under Ohio Rev. Code §2929.04 (B)(7)).

here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err – precisely the type of case in which we are *most* inclined to deny certiorari").

CONCLUSION

WHEREFORE, for the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RANDALL L. PORTER
(*Counsel of Record*)
Office of the Ohio
Public Defender
8 E. Long Street, 11th Floor
Columbus, OH 43215-2998

JOHN H. BLUME
KEIR M. WEYBLE
SHERI L. JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

S. SCOTT HAYNES
Hallowes, Allen & Haynes
6445 E. Livingston Avenue
Reynoldsburg, OH 43068

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REPLY BRIEF

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No. 08-598

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

MICHAEL BIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
David Bobby, Warden

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REPLY BRIEF FOR THE PETITIONER

In his Opposition, Respondent Bies offers a lengthy recitation of facts—his childhood history, state agency reports, and Dr. Winter's trial testimony—to demonstrate that he is mentally retarded. And, as Bies notes, the Ohio Supreme Court indicated that he suffered from "mild to borderline mental retardation" when it affirmed his conviction in 1996. All these facts demonstrate what the Warden does not dispute: that Bies has a viable claim that he cannot be executed in light of *Atkins v. Virginia*, 536 U.S. 304 (2002).

The question in this litigation, however, is not whether Bies has an *Atkins* claim, but rather whether he has a *double-jeopardy* claim—specifically, whether Bies can use the Double Jeopardy Clause as a sword to prevent a state post-conviction court from determining whether his mental impairments are so severe that the Eighth Amendment bars his execution. Even though the two fundamental requirements for a double-jeopardy claim—an acquittal or some other event that terminates jeopardy, and a second proceeding that places Bies at risk of additional criminal punishment—are missing in this case, the Sixth Circuit vacated Bies's death sentence on double-jeopardy grounds. Bies's Opposition offers no defense of that expansive and unprecedented holding.

A. The Warden seeks review of the Sixth Circuit's holding that Bies can, as a matter of law, invoke double jeopardy to bar a state post-conviction proceeding.

Bies first contends that the Warden's legal arguments are not properly before this Court because the Sixth Circuit relied exclusively on 28 U.S.C. § 2254(d)(2) to grant relief. Opp. at 11. According to Bies, the Sixth Circuit vacated his death sentence solely because the state post-conviction court made an "unreasonable determination of the facts" when it rejected his double-jeopardy claim. 28 U.S.C. § 2254(d)(2). He insists that the Sixth Circuit did not make any determination that the state court misapplied federal law and, therefore, did not trench on § 2254(d)(1).

This argument contorts the Sixth Circuit's opinion and ignores the pivotal flaw in the lower court's analysis. The state post-conviction court had held, as a legal matter, that Bies could not invoke the Double Jeopardy Clause as a vehicle to vacate his death sentence. See App. 95a. The Sixth Circuit disagreed, holding that Bies could pursue relief because the Clause is triggered whenever "an issue of ultimate fact" has been determined between the parties. See App. 45a (citation omitted); see also App. 4a (Clay, J., concurring in the denial of rehearing en banc) (asserting that Bies "may claim relief" under double jeopardy). The Warden now seeks review of that *legal* holding. He argues that this Court's precedents foreclose any reliance on the Double Jeopardy Clause, that the state post-conviction court properly rejected Bies's claim, and

that the Sixth Circuit violated § 2254(d)(1) by holding otherwise.

In insisting that the Sixth Circuit relied exclusively on § 2254(d)'s "unreasonable determination of facts" prong, Bies puts the cart before the horse. He pins his argument on a factual determination that the Sixth Circuit was able to make only *after* reaching an erroneous *legal* conclusion on the Double Jeopardy Clause. Specifically, Bies relies on an excerpt from the Sixth Circuit's opinion, see Opp. at 13-14, in which the court concluded that the state post-conviction court's ruling—that the Ohio Supreme Court had not determined the issue of Bies's mental retardation for purposes of *Atkins*—was based on an unreasonable determination of fact because the Court's 1996 opinion referenced Dr. Winter's conclusion that Bies suffered "mild to borderline mental retardation." App. 65a. The Sixth Circuit then held that "[Bies's] *double jeopardy rights* are being violated pursuant to a state court decision that is based on unreasonable determinations of fact." *Id.* (emphasis added). This entire assessment, however, is predicated on the court's earlier holding that Bies has double-jeopardy rights to assert in this case—a holding that is contrary to this Court's precedents and the strictures of 28 U.S.C. § 2254(d)(1).

The central issue raised by the Warden—the applicability of the Double Jeopardy Clause to Bies's efforts to vacate his death sentence—is properly before this Court. The Sixth Circuit squarely addressed this issue, and Bies's suggestions to the contrary are without support.

B. *Ashe v. Swenson* confirms that double jeopardy is not triggered when the jury imposes, and the state courts affirm, a sentence of death.

Following the Sixth Circuit's lead, Bies argues that the Double Jeopardy Clause includes an independent collateral estoppel component that bars the state post-conviction court from conducting an *Atkins* hearing. Opp. at 15. Under Bies's theory, the State may not litigate the fact of his mental retardation because the Ohio Supreme Court resolved that issue in his favor in 1996 when it affirmed his death sentence.

This position ignores the fundamental requirement that "there [be] some event, such as an acquittal, which terminates the original jeopardy," to trigger the Double Jeopardy Clause. *Richardson v. United States*, 468 U.S. 317, 325 (1984). And in capital-sentencing proceedings, "the touchstone for double-jeopardy protection . . . is whether there has been an 'acquittal.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003); see also *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (holding that, "for double jeopardy purposes," "the proper inquiry is whether the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate") (alteration and internal quotation marks omitted); *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984) (asking whether there was "an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for respondent's offense"). And there has been no acquittal in this case. The jury imposed,

and the state appellate courts affirmed, a death sentence for Bies. Accordingly, jeopardy has never terminated.

In response, Bies invokes *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, a group of armed men broke into a private home and robbed six individuals as they played poker. *Id.* at 437. Missouri charged Ashe with armed robbery of one of the participants, but a jury acquitted him. *Id.* at 438-39. Missouri then charged him with armed robbery of a second participant and secured a conviction. *Id.* at 439-40. This Court held that the Double Jeopardy Clause contained a collateral estoppel component that protected Ashe from the second trial because the jury in his first trial had already acquitted him of any role in the armed robbery. *Id.* at 445-47.

Bies contends that the *Ashe* Court also relaxed the Double Jeopardy Clause's "acquittal" requirement, but his argument distorts *Ashe*'s language. He asserts that, "[a]s *Ashe* recognized, the acquittal requirement should not be applied in a 'technically restrictive' way, but rather 'with realism and rationality.'" Opp. at 17 (quoting *Ashe*, 397 U.S. at 444). What this Court actually said is that "[t]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. In the very next sentence, the Court indicated that this collateral estoppel rule should be used to evaluate the force of "a *previous judgment of acquittal* . . . based upon a general verdict." *Id.* (emphasis added).

At no point did the *Ashe* Court import a standalone collateral estoppel component into the Double Jeopardy Clause. Quite to the contrary, the Court affirmatively stated that its collateral estoppel analysis was predicated on an earlier judgment of acquittal: "For whatever else [double jeopardy] may embrace, it surely protects a man who *has been acquitted* from having to 'run the gantlet' a second time." *Id.* at 445-46 (emphasis added and citations omitted). And if more confirmation is needed, one need only look the Court's later decisions in *Rumsey*, *Poland*, and *Sattazahn*. In each, the double-jeopardy analysis turned on a threshold inquiry of whether the defendant had received an "acquittal" in his earlier capital proceeding. The very argument raised by Bies—that specific factual findings on aggravating and mitigating factors in the penalty phase carry a preclusive effect in later proceedings—was rejected in *Poland*. See 476 U.S. at 155-56.

Because no acquittal has occurred in this case, Bies cannot invoke double jeopardy to attack his death sentence.

C. Bies offers no support for his argument that double jeopardy applies to a state post-conviction proceeding that does not expose him to further punishment.

Bies wrongly contends that allowing the state courts to adjudicate his *Atkins* claim would "offend the interests protected by the Double Jeopardy Clause." Opp. at 20. But in *Helvering v. Mitchell*, 303 U.S. 391 (1938), this Court defined the narrow interests that the Clause protects: "[T]he double jeopardy clause prohibits merely punishing twice, or

attempting a second time to punish criminally, for the same offense." *Id.* at 399. Because the state post-conviction proceeding at issue does not place Bies at risk of any *additional* punishment, he cannot claim a double jeopardy violation.

Bies's own authorities confirm this position. See *United States v. Jorn*, 400 U.S. 470, 479 (1971) (noting that the Clause "limit[s] the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws") (emphasis added); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) ("The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused."). The state post-conviction proceeding does not offend double jeopardy because it is not a second criminal proceeding, nor was it brought by the State.

At bottom, Bies mistakenly equates a self-initiated post-conviction proceeding with a second criminal trial brought by the State. See Opp. at 20 ("Reopening the issue of mental retardation . . . would succeed only in providing the State with an opportunity to further pursue a wrongful execution."). But in the state post-conviction proceeding, the State is not seeking to impose a death sentence. Rather, Bies is "taking a second run at vacating his death sentence—which is assuredly his right, but just as assuredly does not offend the double-jeopardy bar." App. 23a (Sutton, J., dissenting from the denial of rehearing en banc).

D. Bies erroneously asserts that the Warden has conceded material facts in an effort to shield this case from review.

On multiple occasions, Bies argues that the State has conceded certain facts about Bies's mental condition that undermine the Warden's Petition. As an initial matter, Bies confuses the doctrine of judicial estoppel with the doctrine of collateral estoppel, see Opp. at 19 n.9 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001)), and there is no suggestion that judicial estoppel is relevant here or applicable here. More to the point, these purported concessions do not bear on the central issue in this litigation—whether Bies can invoke the Double Jeopardy Clause in this habeas proceeding. Even assuming that the Clause applies (which it does not), and that the State's purported concessions carry legal significance (which they do not), Bies's position is inaccurate and unsupportable.

The Warden did not, as Bies asserts, concede "that Dr. Winter used the appropriate clinical definition of mental retardation [under Ohio law]" in his Petition, Opp. at 5 n.2, 14 n.7, much less accept, as Bies suggests, the force of Winter's diagnosis. On page 26 of the Petition, the Warden summarized the Sixth Circuit's collateral estoppel analysis: (1) The Ohio Supreme Court referenced Winter's diagnosis when it affirmed his death sentence in 1996; (2) Winter's methods in 1992 conformed to the mental retardation standards later adopted by the Court in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), in response to *Atkins*; and therefore (3) the Court must have actually decided the *Atkins* issue in 1996. The

Warden then attacked this chain of inferences: "This reasoning improperly assumes that because Dr. Winter applied the diagnostic method that was later outlined in *Lott*, the Ohio Supreme Court must have decided the question using the standard as well." Pet. at 26. This text in no way endorses the Sixth Circuit's conclusion that Dr. Winter's diagnosis of Bies conformed to the judicial definition of retardation developed ten years later by the Ohio Supreme Court. It simply demonstrates that the Sixth Circuit's ultimate conclusion does not automatically follow from its two factual premises.

Bies next contends that the State has conceded the fact of Bies's mental retardation in various state proceedings. See Opp. at 19. Again, this is a misrepresentation. The statements referenced by Bies were summaries of the trial record by prosecutors—that Bies has an I.Q. of 68 or 69, that he is not intelligent, and that he suffers from mild retardation.

The State has *not* conceded that these facts are dispositive, or even sufficient, for the *Atkins* inquiry. As the Ohio Supreme Court has noted, a mental retardation inquiry involves three individualized and specific factual findings: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott*, 779 N.E.2d at 1014. And I.Q. score is only "one of the many factors that need to be considered." *Id.* Such findings have never been made, let alone conceded, in this case. In fact, Dr. Winter's report itself

acknowledges that Bies "functions on a slightly higher level than test results would indicate." Joint Appendix to Sixth Circuit case no. 06-3471, at 1507. Bies is therefore wrong to attribute to the Warden a concession that the Warden could not, and did not, make.

Finally, Bies suggests, wrongly, that the Warden has conceded that a mental retardation inquiry was necessary to the Ohio Supreme Court's 1996 decision affirming Bies's death sentence. See Opp. 22-23. The Warden recognized only that Ohio's sentencing scheme required the Court to conduct an independent assessment into the appropriateness of the death penalty.[1] See Pet. at 28. Because Ohio law did not mandate the level of inquiry contemplated by *Atkins* and *Lott*, it was not a necessary component of the Court's analysis. Cf. *Lott*, 779 N.E.2d at 1014 (noting "the absence of a statutory framework to determine mental retardation" in Ohio).

E. This case is worthy of review.

Contrary to Bies's suggestion, this case warrants review because the Sixth Circuit's analysis is not confined to "the highly idiosyncratic circumstances of this case." Opp. at 10. First, the decision will influence future habeas proceedings. Before *Atkins*, capital defendants frequently raised

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[1] Nor did the Warden characterize Ohio's appellate review process in a manner that contravenes *Tennard v. Dretke*, 542 U.S. 274 (2004). See Opp. at 22 n.11. The Ohio Supreme Court has never excluded arguments of mental retardation as irrelevant; it simply gave them less weight absent a direct nexus to the crime.

allegations of mental retardation as a mitigating factor in assessing the appropriateness of the death penalty. As it did for Bies, the Ohio Supreme Court regularly included a passing remark on direct appeal that the defendant's evidence of "mild retardation" was deserving of some weight in mitigation, but that it did not overcome the aggravating circumstances of the case.[2] See, e.g., *State v. Fears*, 715 N.E.2d 136, 155 (Ohio 1999) (noting that defendant's "low IQ of eighty, near the borderline range of mild mental retardation" was "entitled to some weight"); *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) (same); *State v. Waddy*, 588 N.E.2d 819, 840 (Ohio 1992) (same); *State v. Holloway*, 527 N.E.2d 831, 839 (Ohio 1988) (same). Following the Sixth Circuit's guidance, federal district courts in Ohio and elsewhere in the circuit must grant habeas petitions brought by such prisoners. In fact, one such case is in the pipeline. See *State v. Hill*, 177 Ohio App. 3d 171, 181-86 (Ohio Ct. App. 2008), *appeal docketed*, No. 2008-1686 (Ohio Aug. 25, 2008) (holding that the State could litigate the issue of a capital prisoner's mental retardation because the matter had not been resolved in a pre-*Atkins* penalty-phase proceeding).

Moreover, the decision potentially has ramifications for all types of criminal cases. The Sixth Circuit has allowed an individual who has neither been acquitted of a crime, nor subjected to a second prosecution, to invoke the Double Jeopardy

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[2] Bies's repeated citations to lower state court opinions, see Opp. at 4-6, 18, are irrelevant because, under AEDPA, the federal courts "look to the last state-court decision on the merits." *Garcia v. Andrews*, 488 F.3d 370, 374 (6th Cir. 2007).

Clause as to one specific issue of fact. It is difficult to predict how this unprecedented analysis could expand double-jeopardy protections to other factual determinations in criminal proceedings—suppression motions, evidentiary rulings, sentencing findings, and the like.

Finally, the decision invites unwarranted federal interference in state-court proceedings. Immediately after the state post-conviction court denied his motion for summary judgment, Bies raced to federal court under the cloak of double jeopardy, thereby frustrating any progress in that proceeding or development of the record on the *Atkins* issue. The Sixth Circuit then effectively enjoined the state proceeding without regard for the principles of comity and federalism that inhere in AEDPA, see 28 U.S.C. § 2254(b)(1)(A) (requiring petitioners to "exhaust[] the remedies available in the courts of the State"), *Atkins*, 536 U.S. at 317 (assigning "to the States the task of developing appropriate ways to enforce the constitutional restriction") (citation omitted), and the federal-state judicial balance generally, see *Younger v. Harris*, 401 U.S. 37, 45 (1971).

The existing trial record confirms that Bies has a colorable claim that his mental retardation is so severe that the Eighth Amendment bars his execution. That record, however, was developed years before *Atkins* was decided, without any understanding of the constitutional standards that now govern allegations of mental retardation. At this stage, the Warden is simply asking that habeas petitioners like Bies be put to their proof. In the

unlikely event that the state courts unfairly or improperly adjudicate Bies's *Atkins* claim, the federal courts stand ready to correct the error.

CONCLUSION

For the above reasons, the Court should grant the Petition.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
David Bobby, Warden

December 15, 2008

JOINT APPENDIX

120 (5)

No. 08-598

Supreme Court, U.S.
FILED
FEB 23 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,
Petitioner,

v.

MICHAEL BIES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

JOHN H. BLUME*
**Counsel of Record*
KEIR M. WEYBLE
SHERI L. JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
607-255-1030
jb94@cornell.edu

Counsel for Respondent
Michael Bies

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bmizer@ag.state.oh.us

Counsel for Petitioner
David Bobby, Warden

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 3, 2008
CERTIORARI GRANTED JANUARY 16, 2009

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RANDALL L. PORTER
Office of the Ohio Public
Defender
8 East Long St., 11th Fl.
Columbus, Ohio 43215
614-466-5394
Randall.Porter@opd.ohio.gov

S. SCOTT HAYNES
Hallowes, Allen & Haynes
6445 E. Livingston Ave.
Reynoldsburg, Ohio 43068
614-868-0009
scott@centralohiolaw.com

Additional Counsel for
Respondent Michael Bies

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DOCKET ENTRY NO. 48

ORDER by Judge Susan J. Dlott adopting motion REPORT AND RECOMMENDATION [53-1], denying motion for summary judgment pursuant to Atkins v. Virginia 122 S. Ct 2242 (2002) on the sixteenth claim for relief [48-1] by petitioner Michael Bies; the Petitioner is ordered to file a successive petition for post conviction relief on his Atkins claim in the state court within 30 days from the date of this Order (cc: all counsel) (no pgs: 1) (wam) (Entered: 01/31/2003)

DOCKET ENTRY NO. 65

NOTICE of Filing State Court Mental Retardation Petition by petitioner Michael Bies (no pgs: 2) (sc) (Entered: 05/07/2003)

DOCKET ENTRY NO. 93

THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS by Petitioner Michael Bies. (Haynes, S) Modified on 9/2/2005 (Merz, Michael). (Entered: 04/18/2005)

DOCKET ENTRY NO. 98

MOTION to Bifurcate The Nineteenth Claim for Relief by Petitioner Michael Bies. (Haynes, S) (Entered: 06/10/2005)

DOCKET ENTRY NO. 102

DECISION AND ORDER GRANTING 98 Motion to Bifurcate - Petitioner shall file any memorandum he wishes the Court to consider on his Nineteenth Claim no later than 9/16/05 and Respondent may respond no later than 9/30/05. Petitioner may file a reply memorandum in support not later than 10/07/05. Signed by Judge Michael R Merz on 9/2/05. (dp1) (Entered: 09/02/2005)

DOCKET ENTRY NO. 107

REPORT AND RECOMMENDATIONS - IT IS RECOMMENDED that this Court should conclude that the Double Jeopardy Clause bars retrying the issue of whether Petitioner is mentally retarded. IT IS FURTHER RECOMMENDED that this Court should issue a writ of habeas corpus ad subjiciendum requiring the State of Ohio to vacate Petitioner's capital sentence and re-sentence him in accordance with Ohio law to some other sentence. Objections to R&R due by 12/13/2005. Signed by Judge Michael R Merz on 11/23/05. (dp1) (Entered: 11/23/2005)

DOCKET ENTRY NO. 110

SUPPLEMENTAL REPORT AND RECOMMENDATIONS - IT IS AGAIN RESPECTFULLY RECOMMENDED that this Court issue a writ of habeas corpus ad subjiciendum requiring the State of Ohio to vacate Petitioner's capital sentence and re-sentence him in accordance with the Ohio law to some other sentence. Objections to R&R due by 1/19/2006. Signed by Judge Michael R Merz on 12/30/05. (dp1) (Entered: 12/30/2005)

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ORDER by Susan J Dlott ADOPTING REPORT AND RECOMMENDATIONS for 110 Report and Recommendations & 107 Report and Recommendations. (wam,) Modified docket text on 3/2/2006 (scot,). (Entered: 03/01/2006)

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B-925607
Appeal No. C-920841
(Filed April 15, 1993)

STATE OF OHIO,
Plaintiff,
v.
MICHAEL BIES,
Defendant.

On Behalf of the Plaintiff: Joseph T. Deters, Esq.
Prosecuting Attorney and
Thomas Longano, Esq.
Assistant Prosecuting
Attorney

On Behalf of the Defendant: Joseph A. Dixon, Esq.
and Timothy J.
Deardorff, Esq.

EXCERPTS OF UNSWORN STATEMENT
OF MICHAEL BIES

* * *

[1085] Q. Can you tell the jury what you were drawing?

A. Just a bunch of faces and stuff.

Q. Why were you drawing all those during the trial. Were you not interested in what was going on?

A. I did not understand what was going on.

Q. Do you know what the jury is here to do today?

A. Basically what you just said, just to see what kind of sentence to give me.

Q. Michael, I spent some time with you yesterday, didn't I?

A. Yes.

Q. Now, you really didn't know what to say to the jury, is that right, so you tried to write a statement to the jury?

A. Right.

(Defendant's Exhibit 2 marked for identification)

Q. Michael, do you recognize that?

A. Yes, I do.

Q. Did you write that?

A. Yes.

Q. And can you read that? Are you able to read what you wrote?

[1086] A. Yes, I am.

Q. And would you read that to the jury? Would you like me to read it for you?

A. You can read it for me.

MR. DEARDORFF: Is there any objection to me reading it?

MR. LONGANO: Your Honor, I think it will speak for itself. I would object to counsel reading it.

MR. DEARDORFF: If they are

going to allow it, if it's going to speak for itself and it's going to be admitted and shown to the jury.

THE COURT: I don't have any problem with Mr. Deardorff reading it.

MR. DETERS: Your Honor, the nature of an unsworn statement in itself is the reliability, as the Court is very well aware of. The inflection and tone of this defendant's statement, although unsworn, at least the jury can hear him say it.

THE COURT: I agree Mr. Bies preferably should read it. Is there a problem if he reads the testimony?

MR. DEARDORFF: No. Why don't we let Michael try and read it.

[1087] THE DEFENDANT: I am sorry for everything. I am 20 years old. My sister died about two months ago.

MR. DEARDORFF: Is there any objection if I assist him?

THE COURT: A little prompting would be all right.

MR. DEARDORFF: This is how you spell remember.

THE DEFENDANT: I cannot remember the things that had happened all of my life. I want my mom have to talk about in court. I cannot be on my own to -- I can't read no more.

MR. DEARDORFF: Is there any -- does the Court

THE COURT: Can you read it, Mr.

Deardorff? Is it readable?

MR. DEARDORFF: Well, I'll read it as it's written, Your Honor. I think that the evidence is going to show that Michael basically can't read. And I think the statute allows me great latitude.

THE COURT: Did he write that, though?

MR. DEARDORFF: Yes, Your Honor.

THE COURT: Mr. Bies, are you sure you [1088] can't go on? We can give you a break.

THE DEFENDANT: I can't read it.

THE COURT: You don't want to read it?

THE DEFENDANT: No.

THE COURT: Mr. Deardorff, go ahead and finish.

MR. DEARDORFF: I'll read this to you as clear as I can. "I am sorry for everything. I am 20 years old. My sister died two months. I can't reader thing have happening all of my life. I wants my mother here to tell the court I am not a bad person. I have three kids of my own, too. Always play with my two sons all the time. I would beat as a kid by my mom's boyfriend.

"I am sorry, yes, for not testifying. I was honest on news to polce" – that's police. "I never been in court before. I afraid of it. I once to get mercy on me here. I will stay in jail for life if you will let me. Thank you. Michael Bies."

Q. Now, Michael, is that what you wrote?

A. Yes, it is.

Q. How many children -- you have children,

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B-925607
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STATE OF OHIO,
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Assistant Prosecuting
Attorney

On Behalf of the Defendant: Joseph A. Dixon, Esq.
and Timothy J.
Deardorff, Esq.

EXCERPTS OF TRIAL TESTIMONY OF
DONNA WINTER

* * *

DIRECT EXAMINATION

[1091] BY MR. DEARDORFF: Doctor, would you state your name please for the Court?

A. Yes. It's Donna, middle initial E, Winter, Ph.D.

Q. How are you employed, doctor?

A. I'm a clinical psychiatrist in private practice. I consult to a number of agencies including the Court Psychiatric Center here in Cincinnati.

Q. And in that capacity, did you have a chance to evaluate Michael Bies for the purposes of today's hearing?

A. Yes, I did.

Q. And what is the – could you tell the Court the purpose of today's hearing?

A. This is a mitigation penalty hearing [1092] following a finding of aggravated murder and with specifications.

Q. Did you prepare a report for the Court and jury in that regard?

A. Yes, I did.

Q. I'll show you what I'd like to have marked as Defendant's Exhibit 3. Can you identify this?

A. Yes. That's a report I prepared for the Court.

Q. Okay. And you have a copy of that?

A. I do.

(Defendant's Exhibit 3 marked for identification.)

Q. Doctor, in preparing this report, obviously you've spent some time with Michael, is that correct?

A. That is correct.

Q. How many times did you see Mr. Bies?

A. I met with Mr. Bies three times, on September 8, September 10, and October 10.

Q. And in preparing this report, did you conduct any psychological testing?

A. Yes, I did.

Q. What tests did you conduct?

A. I administered what's called the Wechsler [1093] Adult Intelligence Scale, the revised version, which is a scale of intelligence, and what's called the Bender-Gestalt, a screening test for organicity or brain damage.

Q. In addition to those tests, did you do any other things as far as investigation of this case?

A. Yes, I did.

Q. And what was that that you did?

A. I gathered records of his past history which included records of past psychiatric hospitalizations in Chicago, record of an evaluation done when he was three years old, also in Chicago. The social worker who was working on the case with me spoke with his mother. We spoke with his girlfriend, the mother of one of his sons. Spoke to the prosecutor. Spoke to the defense attorney. I reviewed a videotape which was a walkthrough of the crime scene. I reviewed Mr. Bies' written -- or let's say it wasn't written, it was an audio statement, when he was questioned in regard to the offense. I also sent for school records but never received them,

and sent -- there were two other hospitalizations I don't have and aren't available for review at this time.

Q. Okay. All those things that you did, that's in your report, what you base your conclusions [1094] and findings on, is that correct?

A. That's correct.

Q. The history of Michael Bies, can you explain to the Court basically the history as far as when he was born, what his family situation was maybe for the first 3 to 5 years?

A. Yes. Most of this -- this is based on some of Michael's remembrances, his mother's remembrances and a great deal from a hospital report when he was 3 years old.

Michael Bies is the second of his mother's 3 children. She would have been about 17 at the birth of the first child. He has an older brother and a younger sister.

His father was present in the home for a short time. It's difficult to say how long. There was a boyfriend in the home also in his very younger years.

There's evidence from hospital records of both neglect and abuse. What is known of the mother is actually very little other than that she herself was an abused child who took up with Michael's father.

The father was alcoholic. He was very violent. In his early years, Mr. Bies viewed episodes of violence, he viewed his father beating his mother. His mother remembers and told us that when he was about [1095] 2-1/2 years old, under 3 years old, when

the father was beating the mother, he intervened with a frying pan and tried to hit his father.

When the mother told us that, it seemed unbelievable, when you think of a 2-1/2 year old doing this. However, when Michael was 3 years old, his pediatrician referred him to what's called the Dysfunctional Child Center of the Michael Reese Hospital there in Chicago, and at that age he was given or underwent a complete evaluation.

He was seen by a pediatrician with regard to his health status. He was seen by a psychologist for testing of intelligence, he was seen by a child psychiatrist, he was seen by an occupational therapist, the question being what was his motor function, how was he doing with walking and climbing and things that children need to develop in. He was seen by a speech therapist. I think that was the team.

The reason for the evaluation at the age of 3 years old from the pediatrician, and the words used in the hospital report were, quote, "violent and uncontrollable," which is unusual.

Q. That's my next question. For a 3-1/2 year old child, is that normal behavior? Is that unusual?

A. It's highly unusual behavior.

[1096] Q. How would a 3-1/2 year old know how to act like that?

A. From having been exposed to violence or having been physically abused, hit, from seeing people in his environment being hit, adults fighting,

things of this nature.

Q. At that age, at that report, was there anything in the report or the medical records that you've reviewed as to his personal appearance?

A. Yes.

Q. And what was that?

A. The pediatrician who examined him for health purposes used the words "clothes and body are very dirty."

Q. Was he tested for, does the record indicate whether he was tested, whether he was acting as a normal child, let's say in regard to eating, toilet training, clothing, playing?

Do the records indicate anything in that regard?

A. The records indicate he was delayed in a number of areas. He was behind in speech. He at that age when evaluated was not yet toilet trained. He hadn't walked independently, that is without having to go around and touch furniture until [1096] he was 2 years old.

Mother said she noticed that he was different from his older brother by the time he was 5 years old. So basically speech delays. There was some question at the time of a hearing impairment.

Q. Was there any physical illnesses diagnosed at that time?

A. Well, what the history indicated, which might also speak to some kind of neglect, is that at the age of, I think it was two months old, at the age

of two months old he was hospitalized for dehydration and pneumonia.

At the age of one year old, he was back in the hospital for pneumonia. At the age of 2 years old, he was in the hospital for what they called sleeping sickness, which is encephalitis or inflammation of the brain.

At the time of this 3 year old evaluation, he was found to have a laceration on his head, which the records indicate mother said he fell off a dresser. There had been some other injuries and episodes of pneumonia.

Q. Okay. Now, as we move on, that's roughly the age of 3, is there anything significant in his records, medical records, psychiatric records from the [1097] ages of 3 to 5 or 3 to 6, as we move forward?

A. Yes, although I don't have those records, subsequent records, records of hospital, psychiatric hospitalization records when he was 13, 14 and 15 talk about the fact that when he was 5 years old he was in a psychiatric hospital for what was called a suicide attempt.

And there were a number of suicide attempts or attempts at self mutilation. So we're talking about using a pencil or a pen to poke a hole in the wrist, attempting to jump out of a window.

Q. Do those records indicate whether any psychiatric testing was done, mental status exams taken, or any diagnoses made in that regard?

A. Well, I don't have any records from ages

5 to 7. All I have is at age 3, and then records at 13, 14, and 15.

Q. Okay. When you went to the records, then, when he was age 13 and 14, do those records have any comment about those ages from 5 to 13 about hospitalizations or these suicide attempts?

A. Yes.

Q. And what do those records show us at that time, what Michael's history had been by the age of 13?

A. By the age of 13, Mr. Bies had made a [1099] number of such suicide attempts or gestures, that this was a chronic behavior. There was a lot of threatening. He had been expelled from public school. He was unable to function in public school. His behavior was disruptive. He would disrupt the class. He was violent, often lost control and needed to be restrained.

He was placed in what's called a therapeutic school and that's like a, in Cincinnati it would be a severe behavior handicap class. Children who cannot function in a normal classroom by virtue of their behavior and their learning disabilities.

By that time he had been in special education, what's called special education, had been unable to read and unable to profit.

Q. Doctor, looking at your report on page 3, you mention psychiatric diagnoses?

A. That's right.

Q. That was obtained from records?

A. Right. That's correct.

Q. And what are those diagnoses; what were you able to discover?

A. Well, Mr. Bies received a variety of different diagnoses. Some of them were, and I'll read [1100] from my report: attention deficit/hyperactivity disorder or hyperactive child, adjustment disorder with depression, adjustment disorder with mixed disturbance of emotions and conduct, something called basically a developmental disorder, and a lot of questions about ruling out mood disorder or disorders that involve fluctuations between depression and anger.

Q. Doctor, you've done mental status exams, is that correct?

A. That's correct.

Q. And in a mental status exam, is it not true that you're looking for disorder of thought, mood, perception, those type of things?

A. That's correct.

Q. And do the records show whether any of those diagnoses, as far as his perception and mood and thoughts in those records, besides the ones that you talked about, is there any other diagnosis in that regard?

A. There are signs and symptoms noted which may relate to some other disorder. For example: apparently from time to time Mr. Bies did complain of, quote-unquote, hearing voices, which would be associated with a schizophrenic disorder, although that was never a formal diagnosis and that

is associated with some [1101] very severe personality disorder.

Q. Would you explain to the jury what the term bipolar means?

A. Bipolar refers to a disorder of mood involving both depression on one pole, you could say, and mania or a very elevated overactive state on the other pole. And bipolar disorder refers to an emotional condition wherein a person rapidly fluctuates from one pole to another.

A person can be literally very depressed and down, suicidal, unable to function one day, and the next day can be very irritable, very overactive, very impulsive, expansive, full of self-confidence the next day.

Q. Was that diagnosis ever made with Michael?

A. It had been made in a rule-out fashion. In other words, the psychiatrist who saw him at the time questioned whether that was present. There was not sufficient evidence to give that as a diagnosis. So when a doctor says rule-out on a hospital record, that doctor is saying I see perhaps some signs of this disorder, but I don't see all the signs and I don't have the confidence to make the diagnosis.

Q. Okay. Was there any diagnosis for organic [1102] brain disorder or dysfunctions?

A. That's mentioned. What I can say is that there apparently was some testing, psychological testing at the age of 5, and that is

alluded to -- not alluded to, it's mentioned in later hospital records which established some brain damage. The details of that are unknown.

What I can say is that this is a man who has an intellectual deficiency, he has what are called developmental academic disorder. He cannot read, cannot do that.

These are associated with minimal brain dysfunction always, so that when you do a test for brain damage in an individual like this, you're going to find some.

Q. When you gave the tests that you described initially, what were the findings on those tests? The Wechsler and --

A. The Wechsler Adult Intelligence Scale, which would measure his IQ, more or less what people think of as IQ, established intelligence function within the range of mild mental retardation.

The full scale IQ, and the way an IQ, which is an intelligence quotient, that's what IQ means -- the way that is established is that there are [1103] some tests of verbal skills given, and there are some tests of what are called performance skills, putting blocks together, putting puzzles together, the idea being that intelligence is made up of many different things.

There are some people who are very good with words. There are other people who are not as good with words, but they can build anything and make anything, and look at spatial relations and understand that.

So there are two scores which go together to

make what's called a full-scale score. Mr. Bies' score was 69. Any IQ score that a psychologist would arrive at is usually stated within what's called a confidence band, plus or minus some points, the idea being if you would readminister this, would you get exactly that score or would you get a score within a range.

So if you use the range which I did, you have a plus or minus five points, you have an IQ, probable IQ or intelligence quotient within the range of 63 to 73.

That's what's called mild mental retardation to moderate mental retardation. At the very high level, the high for him, level of 73, you are [1104] talking about intelligence functioning which would be found in the bottom 7 percent of the general population.

What that means is if you could round up all the 20 years old, since he's 20 years old, you would find that he's in the bottom 7 percent. If you got 100 in a general sample, 93 of those people would be brighter than Michael Bies.

Q. With that IQ, is it -- can you compare if I said to you, what grade or what would he be comparable to with that IQ, that age of person, would that be a first grader, third grader? Are you capable of comparing?

A. Yeah. I don't know that I can say exactly but you have at that IQ, depending on which level, no more than a third to sixth grade level function.

Q. Do children's IQs increase as they grow

older?

A. Not necessarily. A child who's very traumatized in childhood, and that can be by surgery, by something that happens to them physically, not just emotionally, they lose IQ points usually because they are spending so much emotional energy dealing with abuse or physical illness that they are unable to learn the way an unencumbered child can.

[1105] Q. So you, based on these records, have diagnosed Michael as being mildy to moderately mentally retarded?

A. No, not moderately. I would say he is mildy mentally retarded to borderline mentally retarded. And by the way, that's reflected in this whole history of special education in the hospital records.

Q. You had a chance to observe what I call Michael's doodles during the court, is that right? Is that correct, you saw the drawings?

A. Yes.

Q. Any comments you can make on that?

A. Just that they are very primitive looking. Teeth, which psychologists would say is associated with angry kinds of feelings. The pictures have big eyes. When psychologists see that they talk about a sense of a person who doesn't trust, who's always watching the environment.

Basically I would say they are very primitive. They are not -- they are unsavory, not pleasant drawings.

Q. When you say that those are the drawings of a person who doesn't trust, and based on the records, how do you think Michael arrived at that? Do [1106] you have a theory as to why he's that way?

A. Well, looking at the hospital records from age 3, those records use the word beatings. They don't say that he was spanked. They used the word beatings, indicating that he was very abused in childhood.

I think that the facts of that kind of behavior at the age of 3 indicate an extremely abusive and chaotic and neglectful and violent childhood, wherein a child learns to imitate what he's seen. That's what children do.

His language at that time in those hospital records involved and he did have a speech delay, he wasn't good at speaking. But what he did say to these doctors. "I'll kill you." He used the word I think "beat."

He admonished the pediatrician who walked in the room, he admonished him and said something to the effect of "you be careful" or "you be good or I shoot you out of the room." They were all very verbal angry words.

His play in the record indicated breaking toys and just being aggressive.

Q. This is all learned behavior at that age?

A. At that age, yes, I would say this is behavior he's imitating from what he's seen around him.

[1107] Q. In reviewing the report, I see that he does receive an income; Michael does, is that correct?

A. That's correct.

Q. Would you tell the jury the history of that?

A. He was receiving social security, what's called SSI or supplemental social security income for his mental disability, and in this case, mild mental retardation. That's according to his mother.

We have no record to verify that, but he was considered to be a disabled child. And from the age, his mother said, of 14 years old was receiving this income as it was an indigent family. The mother has always lived on welfare.

Q. Were you able you spoke with his mother, is that correct?

A. A social worker working with me spoke with his mother and wrote a report for me.

Q. And you reviewed that report?

A. Yes.

Q. And were you able to, are you able to enlighten the jury as to anything about his mother, her history, her relationship with Michael and her children?

A. Well, what we know, and again this is [1108] from -- especially from early records, early records describe a chaotic upbringing, multiple moves, moving one man in and out of the house, a lady who was the victim of abuse herself, who took

up with abusive men who beat her.

She was a lady who -- there are indications didn't take good care of her children, either because she was unable to, was busy elsewhere, whether it was a low income problem, the child was not clean.

There had been some neglect of health with repeated pneumonia. She was a lady who set no limits. One example they gave was at the age of 3 years old on this very cold day at this Michael Reese Hospital, Michael appeared without socks and when they asked mother why he wasn't wearing socks, she said that he didn't want to.

And there were apparently other incidents where she allowed him to make decisions that children should not be making, such as when and where to eat and what to wear.

Q. You mentioned before about Michael, he learned this behavior, he's imitating, he learned to imitate this behavior at that age, is that correct?

A. Yes.

[1109] Q. And is there anything in the record that indicate whether that continued on even up through after the age of 13, that he engaged in that type of behavior?

A. He continued to engage in it.

Q. Was this behavior directed at himself or others?

A. Both. There were multiple instances of self-hurts, wanting to do something to self. He's known -- and this is verified by his girlfriend, he's

known to put alcohol on his skin, set himself on fire. He does not have what we think of as a normal pain threshold. He doesn't feel that kind of pain himself. So he's known to hurt himself.

He's known after that to be threatening towards siblings, a lot of family chaos and crazy things going on between the siblings, one pulling a knife on the other.

Michael said he had been stabbed by his brother. He had once threatened his brother with a knife. And there was a pattern that after he misbehaved, when his mother was perhaps calming him or he had been threatening, after he was behaved, he would become suicidal once it was pointed out to him that he was a bad boy. Even then he would feel very bad and [1110] attempt to hurt himself.

So there's a constant cycle of behavior which is very angry and aggressive and behavior which is depressed, hurting others, hurting himself.

Q. Now, you were present in court when Michael testified, or gave his statement essentially, is that correct?

A. That's correct.

Q. Does that surprise you in any regard that he can't communicate any further what his feelings are?

A. No.

Q. Does it surprise you that he can't convey, even tell a story to them of what happened?

A. No, it doesn't.

Q. If he couldn't tell the story of what happened, in your opinion, would that be a result that he just didn't remember or he can't remember? How would you explain that? Or is he just not being truthful?

A. As a general answer, I'd have to say I don't know. Now I can make some statements after I don't know which is, you know --

MR. LONGANO: There will be an objection at this point, Your Honor, based upon her first part of her answer.

[1111] THE COURT: Yeah. Doctor, are you going to be speculating now?

THE WITNESS: Yes.

THE COURT: Okay. I think – the objection is sustained.

Q. Based on the history that you have reviewed, have you been able to reach an opinion as to how Michael, what his relationships are with like an older man, with a father figure or what his relationship was with any person he would identify as a father figure?

A. Yes.

Q. And what is that?

A. He always yearned for a father. When he talks about the pain of his childhood, interestingly, what he talks about is not having a father, other than physical abuse or the other circumstances of his life.

So he's a fellow who's always wanted a father. And in talking to his girlfriend, somebody who's known him, I think she said about 8 years, said they were kids together at the age of about 12 years old. That's what he always talked about.

Q. Would it be fair to say that is one of the goals in his life is to establish that relationship?

A. It might be; to seek out people who would [1112] be father figures.

Q. You saw the tape of him going through the building, is that correct?

A. Yes.

Q. And obviously he was with the police officers, and going through the building. Can you comment as to what you think was going through Michael's mind at that time when he was taking these police officers through the building?

MR. LONGANO: Objection.

MR. DEARDORFF: Your Honor, the statute clearly says, the statute says that, Number 1, the defendant is allowed great latitude in this case.

And my reading of the law in this area is that if I want to use hearsay or if I want to use speculation, that is permissible in this hearing.

And I would also remind the Court, I don't have a police officer here with a great education. I don't have all the experts.

MR. LONGANO: Could we have a

sidebar if we're going to have a sermon?

MR. DEARDORFF: I'm not giving a sermon. I'm saying why this is relevant.

[1113] MR. LONGANO: The statute is clear, Your Honor. I don't want to argue. I would rather approach sidebar.

MR. DEARDORFF: Your Honor, then I would just say the statute says I have great latitude in presenting it this way, and if he wants to cross-examine, he has that same latitude.

THE COURT: Okay.

Doctor, do you feel you can give an estimate as to what Michael's feelings were at that time or why he did that?

THE WITNESS: I feel I can answer the question in terms of what the dynamics might have been of that direction.

THE COURT: And that is based on all of the diagnoses and looking at records that you've done on this point?

THE WITNESS: Yes.

THE COURT: I'm going to allow it. You may answer.

MR. DEARDORFF: Thank you, Judge. Go ahead, doctor.

A. What I would say, in knowing what Michael Bies is like, and in looking at the videotape, he -- there was a great element of wanting to please a father [1114] figure or somebody who was a father

and was treating him kindly. In his statement to me, and there was a written statement, he perceived himself as helping out.

Q. Okay.

A. As helping the investigation.

Q. Would that be his desire, to gain acceptance and just to have them like him? Would that be a fair statement?

A. I think that's a fair statement.

Q. Now, Doctor, how would you define a mental defect?

A. Well the term mental defect is usually saved for either mental retardation, or some structural damage of the brain, something that can be quantified or measured.

Q. Do you find that Michael had any mental defects in your examinations?

A. Yes.

Q. How would you define the borderline personality disorder?

A. I would define it as a personality disorder. I would define it as an emotional condition.

Q. Okay. Did you find that that existed with Michael in your examinations of Michael?

A. Yes.

[1115] Q. You know the facts of this case pretty much from your interviews and the review of the tape, correct?

A. That's correct.

Q. And you know there was another individual involved in this case?

A. Yes.

Q. And do you know the history of that individual?

A. No.

Q. You're familiar with the terms coercion, duress, et cetera?

A. Yes.

Q. Let me ask you this. Knowing what you know about Michael, knowing that he's been convicted and participated in this offense, would it be fair to say that when we talk about coercion, would Michael be, would it be fair to say that Michael could have been engaged in a form of peer pressure by being with that other defendant?

A. Well, while I probably cannot answer definitively, I do not know the other person or anything about them, it's possible but I don't know.

Q. Would it be fair to say that Michael, based on the background that you know psychologically [1116] and mentally of Michael, that he would in this situation want to try to impress an older individual, another man?

A. That's possible.

Q. Based on the history that you have from Michael, would it be fair to say that because of his mental condition and his background, that if he saw violence taking place that he would want to imitate

it?

A. Yes.

Q. Is that his history, from what you've seen, that he imitates violence?

A. Well, from early childhood, that's where it started.

Q. Are you able to tell me psychologically how old Michael is?

A. Not really.

Q. And your testimony is under the intelligence IQ, he's somewhere from the age of a third grader to a sixth grader?

A. Overall in terms of his ability to think clearly, logically.

Q. Okay. Were you able to determine whether, through your investigation, that he has any prior criminal record or convictions?

A. Apparently, there are no convictions, that [1117] I know.

Q. Were there any juvenile records supplied from Chicago to you?

A. No. The reason was that he had never been adjudicated a delinquent in Cook County and Chicago.

Q. You've given Michael a mental status exam within the last couple of months, I assume, is that correct?

A. Yes.

Q. What is your diagnosis as a result of that exam of Michael?

A. I gave three different diagnoses. He's mildy mentally retarded to a level of borderline mental retardation.

He has what's called a borderline personality disorder. And he also has some, what I'm calling just some nonspecific brain damage which exhibits itself in these learning disabilities that he has, and exhibited itself in what ended up being retardation, because this is not a retardation associated with something genetic like a Downs Syndrome. It's just as nonspecific.

Q. Based on those diagnoses, how do you think Michael perceives this whole trial?

A. Well, in talking to him, he's a very dense [1118] individual. He doesn't have a lot of common sense and this was obvious throughout the whole thing.

I saw him last Saturday before the case was given to the jury for a decision of innocence versus guilt, and he was unable to tell me where he was.

At that point I didn't know whether it had gone to the jury or not. I just hadn't been following it. I asked him and he honestly didn't know.

I started to say had closing arguments been given. He didn't know what I was talking about. Finally, when I pinpointed it is when I said, "Is there a jury sitting somewhere deciding what's going to happen to you? He was able to say: "Well, no, we're going back next week."

The first time I saw him to talk about the events that led to his arrest, very early on, his story was I wasn't in Cincinnati that day. And that was it. Ready to get up and leave, and we were done.

I said well, wait a minute. This doesn't make any sense because I had statements from the prosecution, I had his statement that he had given to the police.

Yet it was as though he could say that to me and that would be fine and that was acceptable and [1119] it was like, no, wait a minute. This is not acceptable.

There was a point in my evaluation, the first or second time I saw him, where he sort of leaned forward in his seat and told me, and had a look of concern in his face, and he said he was very worried about a pending charge of receiving stolen property that he had, I think it was in Illinois or Indiana. And he had not heard anything about this case and he was very worried about it.

I just looked at him and said basically he had his priorities not straight here. He was facing the death penalty, and he's worried about some little thing. And he said I don't want that hanging over my head when I get out of prison.

I just stepped back and tried to get some idea of did he realize that just because of his statement of "I didn't do anything," didn't mean it was impossible for him to get convicted. Did he understand he was facing the death penalty?

And we would go over that with him. Yes, he understands but his thinking is -- he's just very

dense.

Q. Now Doctor, it would be very easy in this type of a hearing for me to tell the defendant to get [1120] up and beg for pity and be remorseful and get sympathy from the jury, cry for his life. Is Michael capable of showing remorse?

A. I think to an extremely limited degree.

Q. Is he capable of showing pity?

A. To an extremely limited degree, if any.

Q. Sympathy?

A. No, those are emotions that are foreign to him.

Q. Does he have a conscience even? Can you tell me that?

A. That would be hard for me to say. He does -- when something is brought to his attention he does have some awareness of it. Whether that's manifested as a conscience, as we know it, I don't know.

Q. Is he impulsive?

A. Highly, extremely impulsive, always.

Q. Explain to the jury what to be impulsive is.

A. The word impulsive is applied to behavior which is engaged in with no thinking about it. Michael Bies is a person who does, he behaves -- he doesn't think about what he's doing. He doesn't think about the consequences, the ramifications.

[1121] He's basically impulse ridden.

Everything about his life, you could call it a whim. Something comes into his head and he does it; he doesn't much think about it.

Q. So if he acted in some violent manner, logic wouldn't enter into it. For example, if he was defending himself, he would be unable to say, okay, I've defended myself and that's it, it's over. He would just continue to be as violent as he could be?

A. Yes.

Q. If Michael engaged in, he's been found guilty of this beating of young Aaron; would impulsivity enter into that, how extreme the beating was?

A. In my opinion, yes.

Q. And it's your testimony that based on his history, he would not be able to control that?

A. He certainly hasn't controlled his behavior from age 3 forward.

Q. Was he ever administered any anti-psychotic medications that you were able to tell during his life?

A. Yes, throughout his childhood he was on all kinds of medication. I mean he was on Ritalin, which is prescribed for hyperactivity, he was on major [1122] tranquilizers which are drugs used in mental illnesses, highly tranquilizing drugs.

We're not talking about the everyday tranquilizers that a person might be prescribed by their physician for ordinary nervousness. We're talking about drugs such as Mellaril and Tofranil.

And in Mr. Bies' case, they were meant to control him, keep him under control. He was constantly losing control, needed to be held at school, went to a special school, they were holding, to calm down was the process.

Q. Doctor, you evaluated Michael previously also based on a motion that was raised about not guilty by reason of insanity, is that correct?

A. That is correct.

Q. And you found in that report that Michael does know the difference between right and wrong?

A. That's right.

Q. But it seems what you're saying, even if he knows that the conduct he engaged in was wrong, he couldn't control it anyway?

A. He doesn't pause to think about the behavior he's about to engage in. If somebody grabs him and says, now wait a minute, is this right or wrong? -- he would know it was wrong.

[1123] He doesn't have the internal control to stop and stay to himself, now, is this right or wrong? What's going to happen if I do this?

Q. Would it be fair to say that all of these factors form the context for his actions or his reactions on the date of Aaron's death, his involvement?

A. In my opinion they all contributed to what happened.

MR. DEARDORFF: Judge, just give me one second. I think that will do it.

(Pause in proceedings)

Q. I just want to ask you one more question, Doctor. From your report, there's a lot of -- you use a lot of the term rage, in your report. When Michael experiences this rage, were you able to determine from his records what his reaction was after that event occurs?

A. His pattern has been to become enraged and then to become depressed, to want to hurt himself after he is back to normal.

Q. There's one incident here I believe you referred to where when he was younger he was engaged in some act of rage and then stated he didn't even remember the act. Do you remember that?

[1124] A. Yes.

Q. Can you explain a little more about that?

A. Well, Michael Bies is a very impulsive person whose rage is an extreme rage, so that when he gets angry, there's a laymen's term I always think of, it's called -- probably you've heard of -- called blind rage. A person is in a blind rage.

A person is so angry they are no longer looking at themselves engaging in a behavior, and if you're not looking at yourself while you're behaving, you can't remember it.

Basically, that's what happens to him. He's just acting in impulse, a blind rage.

Q. So when Michael stated in his statement he doesn't recollect, that's not been unusual for him in his life?

A. That's right.

MR. DEARDORF: I have no other questions, Judge.

THE COURT: Any cross, gentlemen?

CROSS-EXAMINATION

BY MR. LONGANO:

Q. Good morning, Dr. Winter

A. Good morning.

Q. As I indicated out in the hall just [1125] briefly before, I'm one of the prosecutors on the case, Tom Longano.

I'm going to ask you a few questions. And it's not my intent to embarrass you by having a scathing cross-examination. It's an attempt to go into maybe a little more detail concerning some of the things you've testified to, and some of the points that are in your report that I haven't heard yet.

So I'd appreciate it if you could help me better explain in laymen's terms for clarification, Michael Bies' condition, so they understand and so I understand, all right?

A. That's fine.

Q. In looking at your report, and in listening to your testimony, would you agree with me that in laymen's terms we could characterize Michael

Bies as he sits there, to me, as being a mean, nasty and a dangerous person?

Would you agree with that?

A. His behavior has been.

Q. Right.

Well, that's what I'm talking about. He has exhibited behavioral characteristics that I would call mean, nasty, and dangerous. He's dangerous to himself and he's dangerous to others. Would you agree [1126] with that?

A. On his past behavior.

Q. Pardon me?

A. His past behavior certainly in this court has.

Q. Well, his past behavior and his behavior up to and including May of 1992, is certainly dangerous?

A. Yes.

Q. I get the impression then, would you agree with me, he gets angry and lashes out physically?

A. Yes.

Q. He acts on impulse. In other words, he explodes. He goes off like a powder keg. Would that be a fair assessment?

A. Yes.

Q. He has an intense anger. Would that be accurate?

A. Yes.

Q. He can't control that anger and he gets hostile?

A. I'm sorry. He cannot?

Q. He cannot control the anger at times. I'm not saying he does this consistently or continuously, but there are times when he can't control his anger and [1127] he becomes hostile?

A. That's right.

Q. And he can't control the rage and he loses his temper?

A. That's right.

Q. And he has so much of this anger built up that there are times when he doesn't experience pain as someone else would?

A. That's correct.

Q. And at times he becomes violent and totally uncontrollable. Would you agree with that?

A. Yes. I think -- I think the totally uncontrollable aspect is rare. The violence is ongoing. However, he has responded to restraint in the past. In other words, if somebody restrains him, he's responded.

Q. And there were times in his life where he had to be physically restrained, and I would assume in some way restrained with a jacket of some type or some type of physical restraining as a result of his conduct?

A. His mother would hold him to calm him

or stop him and teachers would hold him in this special school.

Q. In fact, when he would lash out, some of [1128] his physical abuse was lashed out against his own mother. Would he hit his mother?

A. On one occasion he did.

Q. Well, severe enough that she had to call the police?

A. Yes.

Q. Now his school background seems to indicate that he was disruptive, and what I would call like a public school setting and he had to be put into a -- more of a private school. I can't recall the term that was used.

A. Therapeutic school.

Q. Therapeutic school.

A. Yes.

Q. He had to be put in a therapeutic school, kind of like a private school. And the reason for that is they were able to deal with these physical outbursts, they were able to restrain him. Was that the reason for that?

A. Yes.

Q. And there were times when he was in this kind of school where, correct me if I'm wrong, but he had to be restrained on at least nine occasions because of his outbursts and physical abuse?

A. According to what he says. He estimated [1129] it to be nine.

Q. Something like that?

A. Yes.

Q. And in fact he was expelled from one of these schools for punching a teacher. Do your records show that?

A. Yes.

Q. And there is some evidence that one some occasions, I'm not saying always, but on some occasions he would consume large amounts of beer. And he denied that, right?

A. Yes. But there was some question about that. Mr. Bies denied it. The woman he had lived with said that that was just not an issue. His mother said when he was there with her earlier on, prior to 16, he had been drinking beer.

Q. I think she said or someone said at one point, he consumed at least a case of beer at one time?

A. Right.

Q. And he had a history of assaulting other children with weapons such as broken glass and knives?

A. Well, now that was 3 years old. And that was an unusual referral at the age of 3 years old, and I have the quotation in there because it was striking that he was acting out in that manner. Very unusual [1130] behavior for a 3 year old.

Q. But that's what he did?

A. That's right.

Q. He was also -- well, how old was he when met up with Carol Lucky, who I believe is the mother of his oldest son?

A. He was about 12.

Q. And is that still an ongoing relationship?

A. Yes.

Q. When was it that he physically assaulted her, what year was that, do you know? Do your records show?

A. I don't know. All I know is that he has a 2 year old son by her and the son was born at that time, so we're talking within the last two years.

Q. So within the last couple of years. And your records also show I think that he lashed out at her physically a couple of times, and on one occasion it was serious enough to send her to the hospital and she ended up with a fractured bone in her face?

A. That's what she said.

Q. Well I mean, out of fairness, most of what you are saying here is based on what other people said. And I know you interviewed Michael a couple of times, but you're relying to a large extent on information [1131] given to you?

A. That's right.

Q. And you're accepting it as being truthful?

A. Yes.

Q. Didn't Michael tell you that at one time

he had an arrest for carrying a concealed weapon?

A. He told me that and then there was a hospital record which indicated that it was never an arrest, that the policeman had stopped him and he had some kind of knife that was used -- he was a paper boy at the time. So there was never an arrest and the reports we got never showed any arrest.

Q. Did your investigation and the history that you obtained also indicate that Michael Bies has a history of attempting to choke his peers, and at one point choked a baby, a younger sister of his, by putting a rope around her neck?

A. That was when he was 3 years old, yes.

Q. Anything to show he did anything after that along those same lines?

A. No.

Q. But putting a rope around someone's neck and choking them is consistent with what you would expect from him?

A. It's consistent with a child who has been [1132] seriously abused and been exposed to a lot of violence and is acting out in a violent manner.

Q. Which is consistent with him -- did you see the photographs in this case?

A. No.

Q. Do you have any idea of what was involved in the physical attack on Aaron Raines?

A. Yes.

Q. That would also be consistent with his

kind of behavior, the way he acts out his anger and aggression?

A. It would be consistent with that.

Q. And part of the problems that he had experienced over the years with school and dealing with other people is he flies into a rage when he doesn't get his own way, basically?

A. Right, he had very poor frustration tolerance.

Q. If things are going along the way he wants them to, that's fine. As soon as they don't go along, then he begins to have his rage?

A. That's right.

Q. Now, let's move up in time to when he's 13. At age 13 he tried to cut his brother's face with a knife and swung the knife at his face at least a [1133] couple of times; would be that fair?

A. That's right. And apparently --

Q. So the behavior is not only at age 3, we're now into his teens?

A. That's right. Apparently that was an ongoing situation in the household with the brother inflicting damage on him, too.

Q. I didn't see that in the report. Was that somewhere in the report, or is that just something you recall?

A. Right, I recall it.

Q. At age 13 he was basically not only involved in fights with his brother, but he was also

involved in fights with other children who were either larger or smaller than him?

A. He was a child who fought.

Q. He didn't like school and he was expelled a couple of times from various schools, would you agree with that?

A. For not going, not attending.

Q. Okay. And he hated the therapeutic schools because the teachers were strict and they would not allow him to take command, isn't that true?

A. Yes.

Q. And when he was 15 years old, he [1134] threatened to kill his mother and attempted to cut his sister's throat?

A. In regard to that incident, that was an admission report to the hospital. Later, and I think that's in my report as well, everybody involved agreed that the incident had been blown out of proportion, that there was a family chaos, a family argument, threats on both sides, but nothing happened.

Q. Of course, that could also be that they didn't want him to get in any more trouble than he's been in already and they were covering up for him. That's reasonable, too, isn't it?

A. That might be.

Q. Is this sister that he tried to -- had the incident with, is that the same one who he's crying about today?

A. You mean when he was 3 years old?

Q. No, I'm talking about when he was 15. When he was 15, he threatened his mother and there's evidence that he tried to cut his sister's throat. That's when he was 15.

A. Oh, that's the same sister.

Q. Is that the same sister?

A. Yeah.

Q. Do you have any idea of how many different [1135] schools and hospitals he had been in since he was 3 years old?

A. Six hospitals that I know of, and at least three schools that I know. I don't have the exact record.

Q. It's safe to say that attempts were made to put him in a school where he could function, attempts were made at treatment. He's dealt with psychiatrists and/or psychologists or someone in the mental health field for many years. Would you agree with that?

A. I can't answer that because I don't know if any of the treatments were ongoing or if he had therapy or counseling, that the hospitalizations were one shot here, one shot there. So I don't know. He's had contact over the years.

Q. He's had some constant contacts on and off for a long period of time?

A. That's right.

Q. And so far, whatever has been done or attempted to be done to treat him has not succeeded?

A. That's correct.

Q. With regard to his IQ, I think you touched upon it, but so I understand it, basically his IQ means that people in his age group, there are a lot more [1136] people smarter than him. Is that what that means?

A. Most of them.

Q. Most of them are smarter than him?

A. The majority are.

Q. That doesn't mean in any fashion that he doesn't know right from wrong, does it?

A. No.

Q. With regard to the organic dysfunction, I believe on Page 3 of your report, his mother says that he had been diagnosed previously with this organic dysfunction and there's a hospital record that talks of -- am I correct so far?

A. Yes.

Q. However, this may refer to a learning disability, perhaps inability to read early on, something like that?

A. It may. He's also received the diagnosis, the specific diagnosis was mixed special developmental disorder. That was one of the diagnoses.

And that does refer to some underlying organic brain dysfunction that would result in a child's having difficulty with thinking and IQ, with language, with speech, with social relations related to other people.

Q. I notice in your report that when you talk [1137] about the organic dysfunction, you are talking in terms of a problem. Of course, to attorneys, we like to have everything pigeonholed and we like to have a definite this or definite that, but you say probably.

Am I correct that probably the reason you're saying probably is because he received an EEG back like in the eighties, mid eighties, 1986, and it did not note anything abnormally wrong with him in terms of that organic brain dysfunction?

A. Not exactly. There is much organic brain damage that doesn't show up on an EEG. And in fact there are people who have abnormal EEG's and no visible brain damage.

I said probably because I'm not a neuropsychologist, and I didn't do any specialized test on him to see if that was there.

And the aspect that I do know of, related to dysfunction, would be the learning disability.

Q. But you do accept the statement in your report that when he was given this EEG, it does not show anything abnormal?

A. Yes.

Q. And do you accept the EEG as a medically sound clinical testing device to look for this organic brain dysfunction?

[1138] A. Well, it's one. A complete neuropsychological evaluation --

Q. I understand. But that's the only one

you mentioned so that's the only one I'm talking about.

A. Right.

Q. Now, with regard to some of the questions Mr. Deardorff asked you about your examination this year, I believe along with a couple of other doctors in the mental health field, regarding his knowing right from wrong at the time that this incident occurred in May of 1992, so we're not talking about this year --

A. (Indicate yes.)

Q. -- he was examined this year by yourself, by Dr. Billings Fuess and by Dr. Myron Fridman to determine if he knew right from wrong, and if he knew that murder was wrong, is that correct?

A. That's right.

Q. And all three found the same thing, if I understand --

MR. DEARDORFF: Your Honor, I'll object to anything brought up by the other two physicians. He can't establish a basis as to how she would know what the two physicians were thinking.

MR. LONGANO: That's all she did was review the records of the other physicians.

[1139] THE COURT: Did you review the other physicians' records?

THE WITNESS: I didn't review them. They are in the chart. I know the findings.

THE COURT: All right.

Q. You're familiar with their findings.

THE COURT: You may answer.

Q. If you need at any time to specifically refer to any of the reports, let me know. And I believe all three of you found the same thing, that Michael Bies at the time of the commission of this murder knew right from wrong, right?

A. That's correct.

Q. He knew that murder was wrong?

A. That's correct.

Q. And he was capable of refraining from committing the act if he chose to do so, correct?

MR. DEARDORFF: Objection, Your Honor, cause I don't know who made that statement.

MR. LONGANO: I'm saying all three. I'll go through specifics.

MR. DEARDORFF: Can you show me where that's said in the reports?

THE COURT: He's asking the doctor. You may answer.

[1140] MR. LONGANO: I'm asking her.

A. I wouldn't use that terminology. I would say he did know right from wrong, and that he paused to think, which in his case would mean somebody intervening and saying, hey, wait a minute, then he does know the difference between right and wrong and would have control.

Q. Well, let me specifically -- if you want to take out Dr. Feuss' report, it's the second last page. I'll let you look at mine.

MR. DEARDORFF: I'm going to object again, Your Honor, unless he's going to introduce that into evidence.

MR. LONGANO: I'll introduce it.

THE COURT: All of her testimony has been based on prior records.

MR. DEARDORFF: But that document is not in evidence.

THE COURT: No, the objection is overruled. Let's move on.

Q. The bottom part of Doctor -- I want to ask you if you would agree with this -- the bottom part of Dr. Fuess' report says that "he," referring to Michael Bies, "was capable of refraining from committing the alleged act if he chose to do so."

[1141] Would you agree with that? Would you agree with Dr. Fuess?

A. Well, I agree with what he's saying basically. I don't agree with the wording.

Q. Okay. Would you agree with Dr. Myron Fridman's assessment that at the time of the offense, Michael Bies was not suffering from a mental illness or defect that rendered him incapable of knowing the wrongfulness of his conduct or conforming his conduct to the requirements of the law?

That's kind of stating it in a little different way. Would you have any reason to disagree with

that?

A. No.

Q. Dr. Fridman also put in his report that he feels that the claims of the defendant trying to commit suicide may have been exaggerated. Do you have that same opinion?

A. No, I would disagree.

W. You'd disagree with him?

A. Yes.

Q. Dr. Fridman found no evidence of any major thought disorder. Would you agree with that or disagree?

A. I agree.

[1142] Q. Would you agree, Doctor, that you cannot guarantee this jury or anyone else that this man could be helped with any kind of rehabilitation, can you?

A. I couldn't guarantee it, no.

Q. And you cannot guarantee that if he gets out, he will not be the same as he is today as his sits there?

A. That's right. I couldn't guarantee it.

Q. He might be. He might even be worse, if that's possible.

A. (No response.)

Q. MR. DEARDORFF: Objection, Your Honor. It calls for speculative testimony.

MR. LONGANO: She's been called

upon to do that all morning.

THE COURT: I wasn't sure if that was a question or a statement, Mr. Longano. Why don't you make it into a question.

Q. You cannot guarantee to the ladies and gentlemen of the jury or the Court that if he were to get out that this condition would be improved, correct? Do you agree with that?

A. That's correct.

Q. And in fact it could be worse if that's possible. He could be more dangerous than he is as he [1143] sits there?

A. He might be more dangerous or less dangerous depending on what happened in the prison setting.

Q. Right.

MR. LONGANO: Just one moment, Your Honor.

THE COURT: Okay.

(Conferring.)

MR. LONGANO: Nothing further. Thank you, ma'am.

THE COURT: Any redirect?

MR. DEARDORFF: Yes, Your Honor.

REDIRECT OF EXAMINATION

BY MR. DEARDORFF:

Q. Doctor, can you guarantee therapy for

any patient to work?

A. No.

Q. Okay. So, Doctor, if he didn't get the death penalty here, do you know when he would get out?

A. Years and years and years down the road.

Q. Would it be fair to say he'd be an old man by the time -- and may not even get out -- would he be an old man when he would get out?

A. Well, into middle age, I would assume.

Q. Tell the jury what an EEG does, Doctor.

[1144] A. An EEG measures brain waves. It's an electroencephalogram, and often brain waives are associated with brain damage. So it looks at the electrical activity of the brain, and decides if that is normal or abnormal. And those are the words here. It's a normal EEG or abnormal EEG.

Q. Now you talked about neuropsychiatrists, is that correct?

A. That's correct.

Q. You're familiar with the method they would use to test for organic brain disorder, is that correct?

A. Yes.

Q. What else would they do besides an EEG?

A. A neuropsychiatrist would sit down and do a complete battery of tests, looking at all aspects

of the brain functioning, looking at how the eyes and hands work in coordination with the left side or the right side of the brain.

They would look at language functions, they would look at motor functions. They would look in depth at memory and visual memory, what you remember from what you see versus what you remember from what you hear.

It's a very sophisticated in-depth testing [1145] specialty.

Q. So a neuropsychiatrist just wouldn't do an EEG and say, okay, that's fine, I'm done, there's my findings; is that fair to say?

A. That's right.

Q. Now, Mr. Longano liked to make or talked about him lashing out at his sister and his violent behavior. Do you have any comment on that? If he had a normal IQ, would your opinion of Michael be any different with that type of behavior?

A. Well, his -- the early developmental base, the low intelligence, the problems with language at a very early age, set the stage for a child who was more frustrated than average.

Children who are developing, it's hard to be a little kid and learn to grow up, and learn all the taxes of infancy and childhood.

He was behind the eight ball because of intelligence, language deficiency and language delay. Just add that then to his other experiences. At 3 years old he was a very frustrated angry kid.

Q. But if I had a 15 year old boy in here who was a sophomore at one of the high schools, normal IQ, didn't have a borderline personality disorder and mild mental retardation, would that make things a little [1146] different in your opinion when we're talking about these violent acts?

MR. LONGANO: Objection.

MR. DEARDORFF: He raised that on direct.

THE COURT: I know. The question seems so broad.

MR. DEARDORFF: Can we have a sidebar, Your Honor?

THE COURT: What about?

MR. DEARDORFF: About this objection.

THE COURT: No, I'm going to sustain the objection.

Q. Do you agree he's mean, he's nasty, and he's dangerous to himself?

A. That is his behavior.

Q. And he's angry and he lashes out like a powder keg, is that correct?

A. That's correct.

Q. And that he has intense anger and he can't control his anger?

A. He has a lot of trouble controlling his anger unless somebody controls it for him.

Q. It sounds like you're describing a Frankenstein here. Is that a fair term to use when we talk about Michael? Using the prosecutor's own words, [1147] if I took those words and said that to you, does that sound like Frankenstein to you?

A. I don't think of Frankenstein. There may be some other term.

Q. Some type of monster. That's what it sounds like, doesn't it?

A. He's not a quote-unquote, normal 20 year old in any way.

Q. We talked about his history when he assaulted his sister at the age of 3. He's not much different today than he was when he was 3, is he?

A. No.

MR. DEARDORFF: No other questions.

THE COURT: Mr. Longano?

MR. LONGANO: Nothing further.

THE COURT: All right, Doctor. Thank you very much.

(Witness excused)

THE COURT: Mr. Deardorff, is there anything further on behalf of the defendant?

MR. DEARDORFF: Your Honor, I am going to ask you to admit into evidence the pictures that my client drew during the trial, which I marked Exhibit 1, the letter which

would be the statement, and the doctor's report.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B-925607
Appeal No. C-920841
(Filed April 15, 1993)

STATE OF OHIO,
Plaintiff,

v.

MICHAEL BIES,
Defendant.

On Behalf of the Plaintiff: Joseph T. Deters, Esq.
Prosecuting Attorney and
Thomas Longano, Esq.
Assistant Prosecuting
Attorney

On Behalf of the Defendant: Joseph A. Dixon, Esq.
and Timothy J.
Deardorff, Esq.

EXCERPTS OF CLOSING ARGUMENT
BY THE DEFENDANT

* * *

[1157] unrefuted.

There is no psychiatrist here testifying today that he's not the equivalent of a third grader to a sixth grader. It's unrefuted. I have clearly shown you by a preponderance of the evidence, I have a 20 year old body here, that's all I have. I got a 3 year old mind.

What do I do with that? How do I defend him? How do I defend this? I can't put him on the stand for you, he's sorry, he was crying. I wish he could have taken the stand. I can't even do that. That's his judgment.

Is that his mental defect? I have an IQ of 63. My daughter is in the first grade, has a higher IQ than that. Am I supposed to put a first grader in front of you and say, come on, Michael, let's defend this case.

All Michael could do was what he did. He cooperated, he took them through the building. And maybe he did it. I don't know if he did it. Michael, I don't even know if he knows he did it.

I know Michael knows what his story is. But I don't know whether I believe him or not. Is he not telling me the truth? Can he not [1158] remember?

So we don't put him on the stand. He's not going to joust with Mr. Longano. Like I said before, I don't have the doctors, I don't have the policemen, I don't have the experts. I've got a 63 IQ. And that's unrefuted.

I said, Doctor, does he have a mental defect? Yes. I said, Doctor, does he act like a 3-1/2 year old? Does he act that way? How old is he psychologically? Does a 3 year old when they are suffering from a mental defect appreciate the criminal acts of their conduct?

Did your children at the age of 3 know when they did something wrong? They know if it's right or wrong. But do they appreciate what they are doing? Do they know that that's a crime? I could go to jail?

And that's what we had here. What is so sick about this is Aaron suffered for this. Look at his

background. His own mother wouldn't even come testify. His sister's been raped twice. He watched that. He's been beaten.

Let me read to you what the report says. You'll read it. "Mr. Bies must have been exposed to extreme chaos and violence within the [1159] home because his behavior at that young age was extraordinary and extreme."

Could you imagine we as parents, what we would do if we had a 3 year old that acted like this? This was a fight. I have a 10 year old. We have a 10 year old sweet little boy. I've got a 6 year old boy.

Only he's got a 20 year old body. He's with an older man. We don't know much about Junior, but I'm telling you if Michael is the principal offender, Junior must be dumber than cat doo-doo. I can't imagine that he could even function.

Now we can go on here. We can talk about what are your options here. Well, the options are you can recommend the death penalty, or you have the right to incarcerate -- and the Judge is going to instruct you -- Michael for 30 years, or 20 years without parole, without consideration for 30 years.

Now you want to talk about future dangerousness. If Michael's a danger I don't want him on the street. I don't want my little boy facing this or anyone like this. But if Michael is a danger in the future, he will be 50

* * *

[1164] out of Xavier or UC, the law would say he's youthful. Remember that. Because in this country we don't kill children. Think about that.

I don't have a kid from UC. I've got a 3 year old. So it's a fight between two kids. Michael, if he

kills, he couldn't even appreciate it. He put his hands on him and said, "Is he alive?"

Do you know why he did that? Because Michael probably never conceived that he was going to die. "I've hit kids all my life. They don't die." He never thought of him dying. That's how his mind works.

Like I said, he sounds like Frankenstein. He's a monster. We've all watched Frankenstein's movies. Whose fault is it that Frankenstein is Frankenstein?

Is it Dr. Frankenstein or is it Frankenstein? Michael didn't create the monster.

This goes on every day. This is going to go on forever. This case is going to be here again and again and again. We put Michael in the penitentiary, we are still going to have

* * *

[1169] him guilty if he did not testify. I'm not stupid. I'm rational.

Why didn't he get up? Why didn't he get up there and deny what he said to officer so-and-so? Why didn't he get up here and fight?

Now you know. And ask in your mind if he got up and did this, if you would have known this, would you have been out 7 hours? Would you have been out longer?

All I want you to know is he's a sick, 3 year old man. That's what I have. That's what you have. And when the statute says age, they are not talking physical. When we talk about age, we're all made up, we're souls, we're spirits, we're brains, we're minds, we're bodies.

He's a 3 year old. We can't execute a 3 year old. If I was at 10 on the scale, I could not execute a child.

Thank you.

THE COURT: Thank you, Mr. Deardorff. Mr. Deters?

MR. DETERS: Thank you, Judge.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B-925607
Appeal No. C-920841
(Filed April 15, 1993)

STATE OF OHIO,
Plaintiff,

v.

MICHAEL BIES,
Defendant.

On Behalf of the Plaintiff: Joseph T. Deters, Esq.
Prosecuting Attorney and
Thomas Longano, Esq.
Assistant Prosecuting
Attorney

On Behalf of the Defendant: Joseph A. Dixon, Esq.
and Timothy J.
Deardorff, Esq.

EXCERPTS OF CLOSING ARGUMENT
BY THE STATE

* * *

[1180] "Chief characteristic was his consistent exquisite sensitivity to any kind of frustration and his rapid tendency to get enraged."

He was referred to the -- by Loretto Hospital emergency room after he, quote, "allegedly threatened his mother and attempted to cut his sister's throat."

Contrary to the closing argument by Mr. Deardorff, his IQ is not 63, it's 68. It's in the report if you'd like to see it.

Michael Bies is not intelligent. I think we can all accept that. I submit anyone who has any intelligence, the level you're familiar with, at least to serve as a juror, would never have done this, never have done that right there (indicating).

He can't read. Well, my gosh, if he can't read, he shouldn't have to answer to this. He can't read. He can't draw. Dr. Winter says in her report, and you can read it yourself, anybody who acts like this must have been exposed to violence or chaos.

No one said that. They just -- no one could act like this unless they had been exposed to some kind of violence or chaos.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

Appeal Case No. C92-00841
Trial Case No. B92-5607
(Filed August 16, 1993)

STATE OF OHIO,
Appellee;

v.

MICHAEL BIES,
Appellant.

EXCERPTS OF
BRIEF OF DEFENDANT / APPELLANT

Timothy J. Deardorff
Supreme Ct. No. 0006308
169 East McMillan Street
Cincinnati, Ohio 45219
(513) 241-4030

Loren S. Haas
Supreme Ct. No. 0001848
169 East McMillan Street
Cincinnati, Ohio 45219
(513) 241-4030

Counsel for Defendant-Appellant

Joseph T. Deters
Hamilton County Prosecutor
914 Main Street
Cincinnati, Ohio 45202

Counsel for Plaintiff-Appellee

* * *

SEVENTH ASSIGNMENT OF ERROR

THE JUDGMENT OF THE TRIAL COURT, AS WELL AS THE JURY, THAT THE AGGRAVATING FACTORS OF WHICH APPELLANT WAS CONVICTED OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENSE IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND TO THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT, AND UNDER ART. I, SEC. 9 OF THE OHIO CONSTITUTION.

First Issue Presented for Review

Where the state fails to prove beyond a reasonable doubt that the aggravating factor of which the accused was convicted outweighs the mitigating factors presented by the defense, a death verdict, and a death sentence imposed by the trial court must be reversed and the accused resentenced to life imprisonment.

This Court is required by O.R.C. § 2929.05 to independently weigh the evidence and to make its own determination of whether the aggravating factors outweigh the mitigating factors in a capital case. If the Court is required to undertake the procedures required under O.R.C. § 2929.05, there is

an initial observation presented by the facts of this case that this Court should consider.

The murder of Aaron Raines was certainly a tragic event. However, the aggravating factors with which the Appellant was charged have nothing to do with the innocence and frailty of the boy; the aggravation is that the killing was accomplished during the course of other felonies. Had Raines' murderer approached him at the park, and for no other reason, driven solely by perversity, malice, and a blood lust to take another human being's life, and committed the homicide in the same manner, this case would not be a capital case. It would be a most serious offense against the law and against young Aaron, but his killer would not even be death-eligible.

This Court, and all courts reviewing this case, must weigh the mitigation offered by the Appellant, and indeed the Appellant's own life, against the motive, not of blood lust, but of sexual satisfaction. That which Ohio law requires to be balanced against the Appellant's life and the mitigation presented is not Aaron's life and innocence, not the nature and circumstances of the offense, but the killer's sexual desires. While it would seem to some more just and appropriate that one who kills for sport, or for the sake of killing, is more deserving of the ultimate sanction than one who kills another in the heat of passion, as occurred here, Ohio does not recognize such a priority.

The aggravating factor presented here, that the murder of Aaron Raines was committed while the perpetrators were attempting to commit another felony, must be given its proper weight in light of the

numerous mitigating factors presented by the Appellant.

During the penalty phase of the trial, a psychiatrist who had tested Bies noted that his score on an intelligence test was a mere 69, which meant that the Appellant was mildly to moderately retarded. He tested at no more than a third to sixth grade level of maturity, and was in the bottom 7 percent of the population in total intelligence (T.p. 1103-1104). Furthermore, he was diagnosed as having a personality disorder caused by "nonspecific brain damage which exhibits itself in these learning disabilities...and...in retardation" (T.p. 1117). He was characterized as "highly, extremely impulsive" and that he acts without thinking about what he is doing or the consequences that would result from his acts (T.p. 1120). This testimony clearly meets the mitigating factor expressed in O.R.C. § 2929.04(B)(3), "whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Michael Bies, an abused, retarded twenty-year-old who was extremely impulsive and did not think before he acted out his impulse, clearly did not appreciate the criminality of his conduct.

Because of Michael Bies' limited mental capacity, he was easily coerced into doing acts which he thought would impress an older authority figure. In fact, the record shows that Darryl Gumm initiated the crimes against Bies; no evidence was ever presented to the contrary. Because of Bies' limited mental capacity, he had a propensity for trying to please authority figures such as Gumm, who is much older than Bies, and for imitating violent acts (T.p.

1116). According to the state's own witness, Gumm was the one who lured the victim into the abandoned building; Gumm was the one who attempted to sexually assault the victim; Gumm was the one who carried the victim to the basement; and Gumm was the one who began to physically assault the victim (T.p. 871). Because of the Appellant's lack of ability to understand what was happening and his willingness to please Gumm, Gumm was able to coerce and provoke the Appellant into harming Aaron Raines. This satisfies §2929.04(B)(2).

The third mitigating factor to be taken into account here is the youth of the accused, per §2929.04(B)(4). The Appellant was twenty years old at the time the incident occurred, but his mental age was that of, at best, a sixth-grader. The statute nowhere defines youth, as a factor in mitigation, as a particular age; this court should take into account the relative youth of the Appellant psychologically and as compared to other adults.

The fourth mitigating factor, and arguably the most import one present here, is the Appellant's "lack of a significant history of prior criminal convictions and delinquency adjudications," as outlined in §2929.04(B)(5). This was Micheal Bies' first criminal conviction of any sort, whether in juvenile or adult courts (T.p. 1116-1117). Although he had problems in various schools and had exhibited some antisocial behavior in the past, he had never been convicted of any crime. Ordinarily, the lack of any prior convictions weighs heavily in mitigation for any defendant who has been convicted of his first offense; here, the court deviated from a standard criminal sentencing practice and decided to put the Appellant to death. This penalty is unconscionable, and should not be allowed to stand.

Finally, the nature and circumstances of the case, when weighed against the aggravating factors, should lead this Court to reverse the Appellant's sentence of electrocution. The testimony of the state's witnesses clearly put forth that the Appellant was a secondary actor in the commission of this horrible crime. Darryl Gumm formulated the plan to capture Aaron Raines for the purpose of eliciting sex from him, and Michael Bies went along with it. Darryl Gumm lured his victim into the building, and Bies went along with it. Darryl Gumm attempted to have sex with Raines, and Bies stood by and watched. Darryl Gumm decided to kill Raines, and Bies finally decided to help out. Quite obviously, Gumm was the leader of the two; although Bies deserves harsh punishment for his actions, he should not be put to death by the state.

Second Issue Presented for Review

When taken as a whole, the mitigating factors presented by the Appellant clearly outweigh the aggravating, circumstance presented in this case.

Various courts in Ohio have held that when each of the mitigating circumstances presented in this case are argued alone, they are not strong enough to outweigh the aggravating circumstances of each case. In *State v. Evans*, 63 Ohio St.3d 231, 586 N.E.2d 1042 (1992), the fact that the defendant had an I.Q. of 64 did not preclude a death sentence; this was the only mitigating factor presented by the defendant. In *Evans*, the Ohio Supreme Court noted that the evidence reflected that the defendant was in charge of the entire incident. Testimony elicited at trial indicated that the defendant gave orders and initiated the events by first producing a gun and holding it to the head of the victim. *Id.* at 244, 1054.

Additionally, there was a report from a psychiatrist that the defendant could function well in a job, at prison, and at home. Clearly the above would not apply to the Appellant herein, as the testimony of the psychiatrist was that the Appellant had the maturity level of a third-grader, and clearly a third-grader could not function well in a job, at prison, or at home. The Supreme Court in *Evans* used these factors to deny the Appellant's assignment of error that it would be unconstitutional to execute someone with an I.Q. of 64. Appellant understands that the rulings in *State v. Jenkins* 15 Ohio St. 3d 164, 473 N.E. 2d 274 (1984) and *State v. Rogers* 17 Ohio St. 3d 174, 478 N.E.2d 984 (1985) allow people with low intelligence levels to be executed. However, the Evans argument that people with low I.Q.'s who *cannot* function reasonably in society should not suffer the death penalty remains unsolved.

In *State v. Van Hook*, 39 Ohio St.3d 256, 530 N.E.2d 883 (1988), the Ohio Supreme Court found that the fact that the defendant was diagnosed as having a "borderline personality disorder" did not amount to a factor in mitigation under O.R.C 2929.04. The Court based its decision on evidence concluding that the defendant had no mental disease or defect which prevented him from conforming his conduct to the requirements of the law. As a basis for that ruling, the court cited that even with his borderline personality disorder, the defendant was able to live and work within a community and society in a peaceful fashion when he chose to do so. The Supreme Court even stated, "the Defendant functioned as a rational human being." *Id.* at 264. In the case before this Court, the prosecutor painted the Appellant as a ruthless, uncaring, savage character since he was three years old (T.p. 1170-1180). Thus, the Appellant surely could not live and

work in a community in a peaceful fashion when he chose to do so nor be considered a "rational human being." Clearly, the argument raised in *Van Hook* cannot be applied to the case at bar. Thus, Michael Bies' borderline personality disorder must be considered a mitigating factor under O.R.C. § 2929.04(B)(7). The trial court failed in its sentencing opinion to consider the Appellant's personality disorder. (See Opinion, R.p. 129). As a result, this Court must consider both the defendant's low I.Q. as combined with the borderline personality disorder, which together outweigh the aggravating circumstance of the felony-murder doctrine.

This Court must also consider the Appellant's relative youth when assessing the weight of the mitigating factors. In *State v. Cooey* 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989), the Ohio Supreme Court held that the weight to be given to a defendant's age as a mitigating factor is to be considered by the trial court on a case-to-case basis. In *Cooey*, the defendant was nineteen years old. In *Eddings v. Oklahoma* (1982) 455 U.S. 104, the U.S. Supreme Court held that the chronological age of a minor is itself a mitigating factor of great weight. In the case at bar, the trial court noted that the "defendant was old enough to know the wrongness of his acts." (R.p. 129, p. 6). The only evidence as to age in the mitigating phase was that of Dr. Donna Winters, who testified that "in terms of his ability to think clearly, logically, he's somewhere from the age of a third grader to a sixth grader," (T.p. 1116), which is chronologically ages 8-11. Obviously, the trial court did not consider the evidence presented regarding the youth of the Appellant. Under *Eddings*, the fact that the Appellant is the equivalent of an 8-11 year old should have been accorded tremendous weight; it was given no weight by the trial court, except that an

8-11 year old should know right from wrong. This court must consider O.R.C. 2151.26(A)(1)(A), wherein a juvenile under the age of fifteen cannot even be prosecuted for a capital murder in the Court of Common Pleas. *See also Thompson v. Oklahoma* 487 U.S. 815 (1988). Except for physical age, in every other aspect of development the Appellant is an 8-11 year old boy.

In summary, the Appellant's low I.Q., his personality disorder, young age (8-11), mental retardation, and possibly organic brain disorder (T.p. 1102-1103), in combination clearly outweigh the aggravating circumstance. These factors have been considered in previous Ohio cases on an individual basis; however, no prior case deals with the combination of mitigating factors such as presented in the case at bar. The trial court erred by weighing these factors individually, as is noted in the court's sentencing opinion (R.p. 129). Had the court weighed the factors together against the aggravating circumstance, the court never would have sentenced the Appellant to die in the electric chair.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

Appeal Case No. C92-00841
Trial Case No. B92-5607
(Filed October 22, 1993)

STATE OF OHIO,
Plaintiff-Appellee;

v.

MICHAEL BIES,
Defendant-Appellant.

EXCERPTS OF
BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters
(#0012084P)
Prosecuting Attorney
William E. Breyer
(#0002138P)
Assistant Prosecuting Attorney
411 Hamilton County Courthouse
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Plaintiff-Appellee

Timothy J. Deardorff
Attorney at Law
Loren S. Haas
Attorney at Law
169 East McMillan Street
Cincinnati, Ohio 45219

Attorney for Defendant-Appellant

* * *

ASSIGNMENT OF ERROR VII

THE JUDGMENT OF THE TRIAL COURT, AS WELL AS THE JURY, THAT THE AGGRAVATING FACTORS OF WHICH APPELLANT WAS CONVICTED OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENSE IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, AND TO THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT, AND UNDER ART. 1. SEC. 9 OF THE OHIO CONSTITUTION.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

A death penalty is properly imposed where the trier of fact determines beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

ARGUMENT

In this assignment of error, the defendant argues that the jury and the trial court erred in finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. Of course in every capital case, this court is required by statute to perform such a review. R.C. 2929.05 *Appeals; procedure.* The gist of the court's responsibility here is a weighing of the evidence process. The court must compare the aggravating factor with the evidence adduced in mitigation, and in this process must review the nature of the offense

and the defendant's character, etc.

In the present case, the defendant was convicted on three specifications: (1) that the offense was committed to escape apprehension; (2) that the offense was committed during an attempted rape; and (3) that the offense was committed during a kidnapping. The nature of these aggravating factors have been set forth in the presentation of facts and need not be repeated here. The mitigation presented was that the defendant was supposedly retarded and/or low intelligence, that he was young, that he had an abused and deprived childhood and that he possibly had "non-specific brain damage" which caused him to have a borderline personality disorder.

The evidence for all of these conclusions is found in the testimony of psychologist Donna Winter, who testified on behalf of the defendant at mitigation. However, the weight to be given this testimony is tempered by the actual facts presented at trial. Thus, though the defense team argued that Bies had the mind of a third grader, and thus should not be held accountable, the record is somewhat contrary.

The record shows that this defendant was married and divorced and had children. He went to the tenth grade in school. He could drive a car. He traveled about the midwest [Hazard, Cincinnati, Chicago, Indiana, Lexington] and functioned well enough to do this on his own. The defendant was able to write out a statement and read it to the jury. The mental status exams revealed that he knew right from wrong and could conform his conduct to meet the law if he so desired. (T.p. 1138-1140) Thus, the weight given to the testimony of Dr. Winter must be tempered with the actual knowledge of the defendant's actions.

Defendant argues that the trial court disregarded his youth as a mitigating factor. This case in that regard is similar to *State v. Byrd*, 32 Ohio St.3d 79, N.E. 2d (1987). In *Byrd*, the Supreme Court wrote:

> "Additionally, defendant contends that the trial court erred in its finding that his young age was not a mitigating factor. The trial court, in its opinion, stated:
>
> '(4) "The youth of the offender." The court

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

Appeal Case No. C92-00841
Trial Case No. B92-5607
(Filed November 12, 1993)

STATE OF OHIO,
Appellee;

v.

MICHAEL BIES,
Appellant.

EXCERPTS OF
REPLY BRIEF OF DEFENDANT / APPELLANT

Timothy J. Deardorff
Supreme Ct. No. 0006308
Loren S. Haas
Supreme Ct. No. 0001848
169 East McMillan Street
Cincinnati, Ohio 45219
(513) 241-4030

Counsel for Defendant-Appellant

Joseph T. Deters
Hamilton County Prosecutor
William E. Breyer
Assistant Prosecutor
914 Main Street
Cincinnati, Ohio 45202

Counsel for Plaintiff-Appellee

* * *

SEVENTH ASSIGNMENT OF ERROR

THE JUDGMENT OF THE TRIAL COURT, AS WELL AS THE JURY, THAT THE AGGRAVATING FACTORS OF WHICH APPELLANT WAS CONVICTED OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENSE IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND TO THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT, AND UNDER ART. I, SEC. 9 OF THE OHIO CONSTITUTION.

First Issue Presented for Review

Where the state fails to prove beyond a reasonable doubt that the aggravating factor of which the accused was convicted outweighs the mitigating factors presented by the defense, a death verdict, and a death sentence imposed by the trial court must be reversed and the accused resentenced to life imprisonment.

Second Issue Presented for Review

When taken as a whole, the mitigating factors presented by the Appellant clearly outweigh the aggravating circumstance presented in this case.

This Court is required by O.R.C. §2929.05 to independently weigh the evidence presented at trial and to make its own determination of whether the

aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt before affirming a sentence of death.

The Appellee contends that the proper standard for judging the mental status of a defendant when mental retardation is presented as a mitigating factor is that the defendant "knew right from wrong and could conform his conduct to meet the law if he so desired" (Brief of Appellee, p. 31). This is essentially the standard used to determine the validity of à not guilty by reason of insanity plea, as outlined in O.R.C. § 2901.01. This is not applicable to weighing evidence in the sentencing phase of a capital murder trial. The facts outlined by the Appellee (Brief of Appellee p. 31), do not show that the Appellant had the mental capacity of an adult; any child in the sixth grade could have sex and find his way around the Midwest. Although Phyllis Thacker, a witness for the state and one of Junior Gumm's close friends, testified that Gumm "could never be a leader," the Appellee takes her statement out of context when considering the mitigating factors apparent here. When reciting Gumm's personal history, her statement goes to show that he would not be a leader in the society, and does not indicate that he was incapable of coercing the Appellant to undergo criminal activity. If fact, the state's evidence proves beyond doubt that Gumm was the leader in commission of the crime (T.p. 871). The state's own evidence thus satisfies O.R.C. § 2929.04(B).

The Appellee then argues that the youth of the Appellant should not be considered, and cites *State v. Byrd*, 32 Ohio St. 3d 79, __ N.E.2d __ (1987) for the proposition that when there is no evidence to suggest that a defendant's age was a factor in the crime or

the sentence of death, it should not be taken into account. In *Byrd*, there was no such evidence; in fact, the trial court there pointed out that the defendant was the "oldest 19 year old [he] has ever seen." That case is in no way analogous to the present situation. Here, testimony was presented that the Appellant's mental age was that of a third- to sixth-grader (T. p. 1103-1104). Therefore, he was a very young and immature person at the time the crime was committed. For this reason, his youth weighs heavily in mitigation.

The evidence presented in this case was clearly weighed improperly by the trial court. When weighing the aggravating factors against the mitigating factors, it is clear that the Appellant does not deserve to be killed.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-920841
Trial No. B-925607
(Filed March 30, 1994)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
MICHAEL BIES,
Defendant-Appellant.

DECISION

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Independent Review: Aggravating Circumstances Outweigh Mitigating Factors

Appropriateness: Sentence of Death is Appropriate

Date of Judgment Entry on Appeal: March 30, 1994

Joseph T. Deters, Prosecuting Attorney, No. 0012084, and William E. Breyer, Esq., No. 0002138, 411 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Timothy J. Deardorff, Esq., No. 0006308, and Loren S. Haas, Esq., No. 0001848, 169 East McMillan Street, Cincinnati, Ohio 45219, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, and the briefs and arguments of counsel.

Defendant-appellant Michael Bies was charged with aggravated murder, attempted rape and kidnapping. The aggravated murder charge contained the following three death-penalty specifications: (1) that the offense was committed to escape detection, (2) that the offense was committed during the commission of an attempted rape, and (3) that the offense occurred during the commission of a kidnapping. Following a jury trial, Bies was convicted as charged and sentenced to death.[1]

On appeal, Bies seeks a reversal of his convictions and sentence of death, advancing twelve assignments of error. We find no prejudicial error in these assignments of error and, therefore, affirm the judgment of the trial court. We further hold that the aggravating circumstances of the murder outweigh the mitigating factors beyond a reasonable doubt, and that the sentence of death is appropriate.

Bies and Daryll "Junior" Gumm came to Cincinnati from Hazard, Kentucky, on May 11, 1992. They spent the afternoon in a park in the area of

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[1] The trial court also sentenced Bies to incarceration for eight to fifteen years on the charge of attempted rape, and for ten to twenty-five years on the charge of kidnapping, such sentences to run consecutively.

Eighth and State Streets drinking beer and smoking cigarettes. As evening approached, they decided that they would like to have sex with a child.

Aaron Raines, a small ten-year-old, was playing in the park at approximately seven o'clock that evening. Raines had some physical disabilities as the result of a car accident the previous year. He also had a partial cast on his foot because he had dropped weights on his toe earlier in the spring.

Gumm, who apparently knew Raines, approached the child and offered him money to help Gumm and Bies collect scrap metal in an abandoned building near the park. However, Gumm and Bies intended to get "blow jobs" from Raines once inside the building.

Bies, Gumm and Raines entered one abandoned building and proceeded to the second floor. They then crossed over a door that had been laid from one window on the second floor of the building to a window on the second floor of another abandoned building. Testimony from Raines's brother indicated that, because of Raines's physical handicaps, Raines would not have voluntarily attempted to cross over into the second building on a door suspended between two second-floor windows.

According to Bies, Gumm attempted to "have sex" with Raines in the second building. When Raines refused, Gumm struck Raines. Raines began to cry. Gumm then carried Raines down into the basement of the building while covering Raines's mouth with his hand.

When they got into the basement, Bies and

Gumm beat Raines with a pipe, a chunk of concrete and a board. They then kicked Raines with sufficient force to leave imprints of gym-shoe tread patterns on the boy's body.

Bies and Gumm left the building and returned to the first building, where they performed oral sex on each other. They then left the area and went their separate ways.

Raines died as a result of the beating from multiple blunt injuries to his head, neck, chest and abdomen. His body was discovered by the police the next day. After approximately nine weeks of investigation by the police, Gumm was arrested for his participation in the killing of Raines. After talking to Gumm, the police arrested Bies in Hazard, Kentucky, for the murder, attempted rape and kidnapping of Raines.

While in Kentucky, Cincinnati police officers Gary Seal and Lucian Guy questioned Bies about his involvement in the crimes against Raines. Initially, in a taped statement, Bies denied being in Cincinnati on May 11, 1992. After informing Bies that the police knew that he had arrived in Cincinnati that day with Gumm, Bies admitted that he witnessed the assault on Raines but denied that he was an active participant in the crimes.

When Bies and police officers Seal and Guy returned to Cincinnati, Bies volunteered to return to the crime scene to refresh his memory on the details of the crimes in order to assist the police in solving the case. When they reached the basement of the second abandoned building, Bies offered detailed statements regarding the weapons used to kill

Raines, including the facts that the pipe had "threading" around the top and that the weapons used to kill Raines were similar in weight to other objecting lying around the building.

When they returned to the police station, police officers Seal and Guy told Bies that they knew that he was lying about his participation in the killing of Raines because of the detail given in his statements to the police. At this point, Bies stated that Gumm lured Raines into the building, but admitted that he expected to have sex with the child. Bies further stated that Gumm attempted to have sex with the child, but that the child resisted. At this point, Bies admitted that he and Gumm took Raines to the basement and beat him.

On September 14, 1992, the guilt phase of the trial began with the selection of a jury from a special venire of seventy-five members. That state produced numerous witnesses and introduced Bies's taped statements and videotaped walk-through of the crime scene into evidence. Bies presented no testimony or evidence in his defense. After taking the evidence under submission, the jury found Bies guilty as charged on all counts and specifications.

On October 15, 1992, the mitigation phase of the trial began. Bies presented his own unsworn statement and the testimony of Dr. Donna E. Winter, a clinical psychiatrist. After receiving instructions from the trial court, the jury deliberated and recommended imposition of the penalty of death.

The trial court then journalized its sentencing opinion in which it independently reviewed the evidence and determined that the aggravating

circumstances found by the jury outweighed the mitigating factors beyond a reasonable doubt. The trial court then sentenced Bies to death for the aggravated murder of Raines.

I.

In his first assignment of error on appeal to this court, Bies contends that the trial court erred in permitting the prosecution, in closing argument during the penalty phase of the trial, to appeal to the passions and prejudices of the jury to secure a sentence of death. Specifically, Bies objects to the following statements made by the prosecution:

> His mother wouldn't testify. * * * Maybe, and you can infer whatever you'd like, what [Bies's] mother has to say about him isn't something they want you to hear.
>
> He was disrupting class as early as kindergarten. He was expelled from public schools and placed in therapeutic schools which deal with severe behavior problems.
>
> I would submit that tears of sympathy are very much misdirected here.
>
> I submit to you, ladies and gentlemen, that Michael Bies is a parent's worst nightmare.
>
> You've seen the pictures. What happens to a little 10 year old 85 pound 4-1/2 foot boy with a cast on his foot? You saw what happened to him when he doesn't comply with what Michael Bies wants him to do. He takes a pipe to his head trying to force him to do this. He breaks his jaw. He breaks his teeth.

The prosecution, as well as the defense, is permitted wide latitude in closing arguments. *State v. Maurer* (1984), 15 Ohio St.3d 239, 269, 473 N.E.2d 768, 794-795, certiorari denied (1985), 472 U.S. 1012, 105 S.Ct. 2714. The parties may comment on the evidence and any reasonable inferences that may be drawn therefrom. *State v. Allen* (Sept. 9, 1993), Cuyahoga App. No. 62275, unreported. The prosecution may also comment on the accused's demeanor and physical appearance because the accused's face and body are considered physical evidence. *State v. Lawson* (1992), 64 Ohio St. 3d 336, 347, 595 N.E. 2d 902, 911, certiorari denied (1993), __ U.S. __, 113 S.Ct. 1653.

The prosecution's comments in closing argument during the penalty phase of the trial with respect to Bies's disruptive behavior in school, and the fact that Bies broke Raines's jaw and teeth, were proper comments on the evidence presented at trial. The comments of the prosecution regarding the fact that Bies's mother did not testify on her son's behalf were proper comments on the reasonable inferences that could be drawn from Bies's statement that his mother wanted to come to the trial but that she couldn't be there with him. The prosecution's comment that "tears of sympathy are very much misdirected here" was a proper comment on the demeanor of Bies during the trial as the record indicates that Bies cried while giving his unsworn statement during the mitigation phase.

With respect to the prosecutor's comment that Bies was a "parent's worst nightmare," we note that even improper comments in closing argument are not

grounds for reversal of a sentence of death unless the improper comments prejudicially affected substantial rights of the defendant. *State v. Lawson*, 64 Ohio St.3d at 347, 595 N.E.2d at 911. A prosecutor's misconduct during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial. *State v. Maurer*, 15 Ohio St.3d at 266, 473 N.E.2d at 793. Where it is clear beyond a reasonable doubt that the jury would have recommended the death sentence even absent the prosecutor's remarks, reversal of the sentence of death is not required. *State v. Beuke* (1988), 38 Ohio St. 3d 29, 33, 526 N.E. 2d 274, 280, certiorari denied (1989), 489 U. S. 1071, 109 S. Ct. 1356. We hold that Bies incurred no prejudice as a result of the prosecutor's remark because, as will be discussed later in this decision, we find, as did the court in *Lawson*, that the aggravating circumstances clearly outweigh the mitigating factors even in the absence of this prosecutorial comments. Since the outcome of the penalty phase would have been the same even had the prosecutor refrained from making this comment, we regard any alleged error as harmless. We, therefore, overrule Bies's first assignment of error.

In his second and third assignments of error, Bies states as follows:

> THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CONCOMITANT PROVISION OF THE OHIO

CONSTITUTION [ART. I. SEC. 9] IN INSTRUCTING THE JURY AT THE PENALTY PHASE, SIXTEEN TIMES, THAT THEIR SENTENCING DECISION WAS MERELY A "RECOMMENDATION," THUS IMPERMISSIBLY ATTENUATING THE JURY'S RESPONSIBILITY FOR THEIR AWESOME DECISION. [SIC]

THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF THE APPELLANT BY SUBMITTING TO THE JURY A VERDICT FORM AT THE SENTENCING PHASE STATING THAT THE VERDICT OF THE JURY WAS MERELY A "RECOMMENDATION." [SIC]

As the state points out, Bies did not object at trial to the use of the term "recommendation" in the court's instructions to the jury or in the verdict form. Unless this rises to the level of plain error, this court need not consider these alleged errors. See *State v. Waddy* (1992), 63 Ohio St.3d 424, 437, 588 N.E.2d 819, 830; *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, paragraph one of the syllabus. However, we address these assignments of error here because of this court's ongoing concern over the practice of trial courts commenting on who bears the ultimate responsibility for determining the penalty in a capital case.

In support of these assignments of error, Bies, citing *Caldwell v. Mississippi* (1985), 472 U.S. 320, 105 S.Ct. 2633, argues that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led

to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Although critical of the practice of a trial court commenting on the question of who bears the ultimate responsibility for determining the penalty in a capital case, the Supreme Court of Ohio has repeatedly rejected this argument where the charge to the jury under consideration was an accurate and correct statement of Ohio law. See *State v. DePew* (1988), 38 Ohio St.3d 275, 280, 528 N.E.2d 542, 550, certiorari denied (1989), 489 U.S. 1042, 109 S.Ct. 1099, and the cases cited therein. The supreme court has held that "the jury in the penalty phase of a capital prosecution may be instructed that its recommendation to the court that the death penalty be imposed is not binding and that the final decision as to whether the death penalty shall be imposed rests with the court," so long as such instruction does not result in prejudice denying the defendant a fair trial. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N. E. 2d 264, paragraph six of the syllabus, certiorari denied (1985), 472 U.S. 1032, 105 S.Ct. 3514.

The trial court used the word "recommendation" repeatedly throughout its charge to the jury in the penalty phase of the trial and included the word "recommend" in the verdict form provided to the jury. The trial court then instructed the jury regarding its role in the sentencing process as follows:

> You must understand, however, that the jury's recommendation to the Court that the death penalty be imposed is just that, a

> recommendation, and is not binding on the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests with this Court, after the Court follows certain additional proceedings required by the laws of this State.

After criticizing trial courts for commenting on the fact that the court itself bears the ultimate responsibility for determining the penalty in a capital case, the Ohio Supreme Court has nevertheless held that a charge such as the one given by the trial court in the instant case is not inaccurate or misleading, nor is its effect upon the jury constitutionally infirm. *State v. Landrum* (1990), 53 OhioSt.3d 107, 121-122, 559 N.E.2d 710, 727, certiorari denied (1991), 498 U.S. 1127, 111 S.Ct. 1092; *State v. Buell* (1986), 22 Ohio St.3d 124, 144, 489 N.E.2d 795, 812, certiorari denied (1986), 479 U.S. 871, 107 S.Ct. 240; *State v. Jenkins*, 15 Ohio St.3d at 202, 473 N.E.2d at 299. For this reason alone, we hold the repeated use of the word "recommendation" in the charge to the jury and in the verdict form did not result in prejudice to Bies which would require that he be resentenced. However, we join the supreme court in taking a dim view of this practice.

As the Supreme Court of Ohio stated in *Buell*, 22 Ohio St.3d at 144, 489 N.E.2d at 813:

> As we stated in *Jenkins*, *supra*, at 202, and we now emphatically emphasize, the better procedure would be to have no comment by the prosecutor or the trial judge on the question of who bears the ultimate

> responsibility for determining the penalty. [Emphasis ours.]

R.C. 2929.03(D)(2) explains the role of the jury in imposing a sentence in a capital case. The pertinent part of that statute reads as follows:

> If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.

Consistent with R.C. 2929.03(D)(2) and the above-quoted language from the supreme court, we see no need for the trial court to instruct the jury on anything beyond this part of the statute with respect to the imposition of the penalty of death. The trial court's responsibilities after the jury's recommendation of a sentence are absolutely irrelevant to the jury's determination.

We note in this regard that the Ohio jury instruction for sentencing hearings in death-penalty cases properly tracks and follows R.C. 2929.03(D). 4 Ohio Jury Instructions (1993), Section 503.016(A). While today we overrule the second and third assignments of error, we advise the courts below to heed the advice of the Ohio Supreme Court as articulated in *Buell* and to charge the jury in a death-penalty case in accordance with the Ohio jury instruction on "Recommendation of Sentence" in Section 503.16(A) instead of the instruction used in

the case at bar.[2]

In his fourth assignment of error, Bies contends that the trial court erred in its sentencing opinion by relying upon nonstatutory aggravating circumstances and by giving insufficient consideration to relevant mitigating factors. The basis of his complaint under this assignment of error is that the trial court referred to the facts and circumstances of the offense in determining that the aggravating circumstances outweighed the mitigating factors. It is true that the nature and circumstances of an offense are not a statutory aggravating circumstance and cannot be considered as such. *State v. Lott* (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293, 304-305, certiorari denied (1990), 498 U.S. 1017, 111 S.Ct. 591; *State v. Davis* (1988), 38 Ohio St.3d 361, 370-372, 528 N.E.2d 925, 933-936, certiorari denied (1989), 488 U.S. 1034, 109 S.Ct. 849. However, a "trial court * * * may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the

---

[2] 4 Ohio Jury Instructions (1993), Section 503.016(A) provides in pertinent part as follows:

> Members of the jury, you have heard the evidence and the arguments of counsel and you will now decide whether you will recommend to the court that the sentence of death shall be imposed upon the defendant and if not, whether you will recommend that the defendant be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

mitigating factors." *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus, certiorari denied (1988), 484 U.S. 1079, 108 S.Ct. 1060. See, also, *State v. Moreland* (1990), 50 Ohio St.3d 58, 69, 552 N.E.2d 894, 905, certiorari denied (1990), 498 U.S. 882, 111 S.Ct. 231. Bies's fourth assignment of error, therefore, lacks merit.

Bies next contends, in his fifth and sixth assignments of error, that his convictions for kidnapping and attempted rape were not supported by sufficient evidence and that those convictions were against the manifest weight of the evidence. A verdict in a criminal case "can not be said as a matter of law to be manifestly against the weight or sufficiency of the evidence where substantial evidence is offered by the state in support of all of the elements of the offenses charged, and if such evidence was of sufficient probative value to sustain the convictions, the reviewing court will not reverse on the sufficiency or weight of evidence." *State v. Barnes* (1986), 25 Ohio St.3d 203, 209, 495 N.E.2d 922, 927, certiorari denied (1987), 480 U.S. 926, 107 S.Ct. 1388.

Under these assignments of error, Bies maintains that there is no evidence in the record that he kidnapped Raines or that he attempted to rape Raines. Instead, he argues that the record demonstrates that Gumm lured Raines into the abandoned buildings and that Gumm attempted to have anal intercourse with Raines. However, Bies's statement to the police indicate that Bies and Gumm conspired to abduct a child and to have sexual intercourse with that child.

Under R.C. 2923.03(F), a complicator to an offense "shall be prosecuted and punished as if he were a principal offender." Because the evidence at trial indicated that Bies was at least a complicator in the kidnapping and attempted rape of Raines, he was properly convicted of those crimes. His convictions were neither unsupported by sufficient evidence nor against the manifest weight of the evidence. Accordingly, Bies's fifth and sixth assignments of error are overruled.

In his seventh assignment of error, Bies maintains that the trial court erred in holding that the aggravating circumstances surrounding the aggravated murder outweighed the mitigating factors presented by the defense. As will be discussed and explained at the end of this Decision during our independent review of the appropriateness of the imposition of the death penalty, we hold that the trial court did not err in determining that the aggravating circumstances of which Bies was convicted outweighed the mitigating factors presented in his defense. This assignment of error is, therefore, overruled.

Bies's eight assignment of error states that the trial court erred in overruling his motion to suppress his statements to the police. Under this assignment of error, Bies argues that he lacked the mental capacity to waive his rights voluntarily, and that, therefore, his statements to the police were not admissible evidence.

At the hearing on the motion to suppress Bies's statements, Bies and police officers Guy and Seal testified. The police officers stated that they

read the notification-of-rights form to Bies several times, that Bies understood his rights as read to him, that Bies reviewed the form and that Bies signed the form waiving his rights. Bies testified that he did sign the form provided to him by the police officers.

In determining the voluntariness of a confession, "the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Smith* (1991), 61 Ohio St.3d 284, 288, 574 N.E.2d 510, 515, certiorari denied (1992), ___ U.S. ___, 112 S.Ct. 1211, citing *State v. Barker* (1978), 53 Ohio St. 2d 135, 372 N.E.2d 1324, paragraph two of the syllabus. The testimony of the police officers and of Bies supports the finding by the trial court that the statements in question were voluntary. The interrogations were neither prolonged nor intense. Bies indicated that he had reached the tenth grade in school and that he was familiar with the criminal justice system. There is no indication of mistreatment, physical deprivation or threats directed toward Bies during the interrogations. Furthermore, the taped interviews indicate that Bies talked to the police voluntarily in an effort to assist them with their investigation of the crimes.

With respect to Bies's claim that he lacked the mental capacity to waive his rights voluntarily, we note that there was no evidence presented at the suppression hearing to indicate that Bies was mentally incapable of making informed decisions at

the time he was questioned by the police. We, therefore, hold that the trial court's refusal to suppress Bies's statements to the police was not error. Accordingly, the eighth assignment of error is overruled.

In his ninth assignment of error, Bies contends that his conviction must be reversed because the trial court erred in failing to grant his motion for a change of venue. Bies argues that there was a reasonable likelihood of prejudice to him where many of the jurors had been exposed to pretrial publicity concerning the murder of Raines.

A trial court must change the venue of a criminal case "when it appears that a fair and impartial trial cannot be held in the court in which the action is pending." Crim.R. 18(B). See, also, R.C. 2901.12(K). However, absent a clear showing of abuse of discretion, a trial court's ruling on a motion for change of venue should not be disturbed by an appellate court. *State v. Mills* (1992), 62 Ohio St.3d 357, 363-364, 582 N.E.2d 972, 980, certiorari denied (1992), __ U.S. __, 112 S.Ct. 3048; *State v. Maurer*, 15 Ohio St.3d at 250, 473 N.E.2d at 780.

The best test for a change of venue is whether an impartial jury can be seated. *State v. Maurer*, 15 Ohio St.3d at 252, 473 N.E.2d at 781, citing *State v. Osborne* (1976), 49 Ohio St.2d 135, 139-141, 359 N.E.2d 78, 83-84, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3136. In this case, the record on *voir dire* establishes that prospective members of the jury had been exposed to pretrial publicity, but affirmed that they would judge the defendant solely on the law and the evidence

presented at trial. Therefore, this was not a case where there was a reasonable likelihood that Bies would not receive a fair trial. Accordingly, we hold that the trial court did not abuse its discretion in denying the motion for a change of venue. See *State v. Spirko* (1991), 59 Ohio St.3d 1, 23-24, 570 N.E.2d 229, 254, certiorari denied (1991), __ U.S. __, 112 S.Ct. 312.

In his tenth assignment of error, Bies claims that the trial court improperly excluded prospective jurors during *voir dire* because of their general opposition to the death penalty. The trial court in this case did not abuse its discretion in excusing the prospective jurors whose views would have substantially impaired their ability to serve as jurors in accordance with their instructions and oaths. See *State v. Hills*, 62 Ohio St.3d at 364-365, 582 N.E.2d at 981; *State v. DePew*, 38 Ohio St.3d at 280, 528 N.E.2d at 549; *State v. Steffen* (1987), 31 Ohio St.3d 111, 120, 509 N.E.2d 383, 393, certiorari denied (1988), 485 U.S. 916, 108 S.Ct. 1089. The tenth assignment is, therefore, overruled.

In his eleventh assignment of error, Bies argues that the trial court improperly denied his motion to prohibit "death qualification" of the jury, thereby infringing upon his right to be tried by a jury which reflected a fair cross-section of the community. The trial court, at *voir dire*, removed for cause those prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty. However, "death qualification" of a jury does not violate a defendant's Sixth Amendment right to be tried by a fair cross-section of

the community, nor does it violate his constitutional right to an impartial jury. *Lockhart v. McCree* (1986), 476 U.S. 162, 106 S.Ct. 1758. We, therefore, find no merit in this assignment of error.

Finally, to preserve further appellate and collateral review, Bies argues in his twelfth assignment of error that the trial court erred in failing to grant his motion to dismiss because Ohio's statutory scheme for imposing the death penalty violates the protections guaranteed by the United States Constitution and the Ohio Constitution. In support of this assignment of error, Bies raises twelve issues for our consideration.[3]

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[3] The twelve issues presented for review in Bies's twelfth assignment of error are as follows:

> (1) Whether the Death Penalty violates the prohibition under the 8th Amendment of the United States Constitution against cruel and unusual punishment.
>
> (2) Whether the Death Penalty in Ohio is applied in an arbitrary and capricious fashion since it permits prosecutors to exercise discretion in deciding who will be charged with capital offenses.
>
> (3) Whether the Ohio Death Penalty scheme fails to require premeditation or deliberation as the culpable mental state for defendants in all capital cases.
>
> (4) Whether O.R.C. 2929.03 sets forth no standard of proof to be applied in determining mitigating factors.
>
> (5) Whether O.R.C. 2929.03 fails to give the jury a standard with which to balance the mitigating factors against the aggravating circumstances.
>
> (6) Whether the consideration of aggravating circumstances at the guilt phase of the trial is unconstitutional.

Each issue presented by Bies has been considered and rejected by the Ohio Supreme Court before, and is, therefore, summarily overruled on the authority of the syllabus of *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, certiorari denied (1988), 488 U.S. 916, 109 S.Ct. 272. See *State v. Coleman* (1989), 45 Ohio St.3d 298, 308-309, 544 N.E.2d 622, 633-634, certiorari denied (1990), 493 U.S. 1051, 110 S.Ct. 855; *State v. Steffen*, 31 Ohio St. 3d at 125-126, 509 N.E. 2d at 396; *State v. Buell*, 22 Ohio St. 3d at 138, 489 N.E. 2d at 808; *State v.*

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(7) Whether the Ohio Death Penalty scheme is unconstitutional in that it does not give the sentencing authority the option to impose a life sentence, or give mercy, when it finds that the aggravating circumstances outweigh the mitigating factors.

(8) Whether the Ohio Death Penalty scheme is unconstitutional because of a bifurcated trial with the same jury which denies the defendant an impartial jury and the effective assistance of counsel.

(9) Whether the Ohio Death Penalty scheme is unconstitutional because in conjunction with Crim.R. 11(C)(3), it encourages defendants to waive their fundamental rights and enter guilty pleas.

(10) Whether the Ohio Death Penalty is unconstitutional because it is a mandatory death penalty.

(11) Whether the Ohio Death Penalty is unconstitutional in that it fails to provide for adequate appellate review.

(12) Whether the aggravating circumstances the accused is charged with committing, O.R.C. 2929.04(A)(3) and (7), are constitutionally invalid when used to aggravate O.R.C. 2903.01(B) aggravated murder.

Maurer, 15 Ohio St.3d at 241-242, 473 N.E.2d at 773-774; *State v. Jenkins*, 15 Ohio St.3d at 167-179, 473 N.E.2d at 272-281. See, also, *State v. Hill* (Dec. 22, 1993), Hamilton App. No. C-920497, unreported. Bies's twelfth assignment of error is overruled.

II.

Having addressed and rejected each of Bies's twelve assignments of error, we now independently review and weigh the facts and the other evidence disclosed in the record to determine whether the aggravating circumstances outweigh the mitigating factors, if any, demonstrated in the record in accordance with R.C. 2929.05(A).

The aggravating circumstances the jury found to exist were those charged in the indictment. Specifically, the jury found that Bies committed the offense of aggravated murder to escape detection for another offense committed by him; that Bies, as the principal offender in the commission of aggravated murder or with prior calculation and design, committed the offense of aggravated murder while committing or while fleeing immediately after committing the offense of kidnapping; and that Bies, as the principal offender in the commission of aggravated murder or with prior calculation and design, committed the offense of aggravated murder while attempting to commit or while fleeing immediately after attempting to commit the offense of rape. We find these circumstances established in the record beyond a reasonable doubt.

The mitigating factors to be considered are those found in the nature and circumstances of the offense; the history, background, and character of

Bies; and any other factors listed in R.C. 2929.04(B)(1) through (7) which exist in this case.

The nature and circumstances of the offense are particularly heinous and we find that they are entitled to no weight as mitigation.

As to Bies's history, background and character, the record demonstrates that his father was an alcoholic who was abusive toward Bies's mother, and that his father disappeared from his life "early on;" that he was raised in an "unstable" home situation with multiple moves and "a good deal of violence;" that he has been violent since the age of three; that he has exhibited developmental delays from birth; that he has been in special education classes since kindergarten; that he was placed in "therapeutic schools" that deal with severe behavioral problems; that he has a history of psychiatric hospitalizations; that he has exhibited suicidal tendencies; that he does not abuse drugs or alcohol; that he has three children; and that he is divorced. We find that these factors are of minimal mitigating value. See *State v. Grant* (1993), 67 Ohio St.3d 465, 486, 620 N.E.2d 50, 71; *State v. Green* (1993), 66 Ohio St.3d 141, 152-154, 609 N.E.2d 1253, 1262-1264, certiorari denied (1993), __ U.S. __, 114 S.Ct. 250.

Furthermore, Bies was only nineteen years old at the time he committed the offense of aggravated murder and he did not have a significant history of prior criminal convictions. See R.C. 2929.04(B)(4) and (5). Bies's relative youth and lack of prior criminal convictions are entitled to some weight in mitigation. See *State v. Grant*, 67 Ohio St.3d at 486,

620 N.E.2d at 71.

Finally, Bies's "psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction characterized by specific learning disabilities." The mitigating factor in R.C. 2929.04(B)(3) is whether at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law. None of the psychological factors presented by Bies are enough to prove the diminished-capacity requirements of this section. *State v. Richey* (1992), 64 Ohio St.3d 353, 372, 595 N.E.2d 915, 931; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 263, 530 N.E.2d 883, 890, certiorari denied (1989), 489 U.S. 1100, 109 S.Ct. 1578. However, these factors are entitled to some weight in mitigation under R.C. 2929.04(B)(7).

The aggregate of these mitigating factors is in no way sufficient to outweigh the aggravating circumstances of the murder committed by Bies. Accordingly, we hold that the aggravating circumstances of the killing of Aaron Raines clearly and beyond a reasonable doubt outweigh anything that was presented in mitigation of punishment.

III.

Finally, we must determine if the sentence of death is appropriate in this case. R.C. 2929.05(A) provides that the court of appeals must

independently determine whether the sentence of death is appropriate by considering "whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." However, "the proportionality review required of the court of appeals pursuant to R.C. 2929.05(A) need not include criminal cases outside its geographical jurisdiction." *State v. Steffen*, 31 Ohio St.3d at 123, 509 N.E.2d at 394, citing *State v. Rogers* (1985), 17 Ohio St.3d 174, 478 N.E. 2d 984, paragraph nine of the syllabus.

We have compared the facts and circumstances in this case with our previous death-penalty decisions. Based upon that review, we conclude that the sentence of death imposed upon Bies is neither excessive nor disproportionate, and that it is an appropriate sentence.

IV.

In conclusion, we hold that Bies's twelve assignments of error concerning the proceedings below are without merit. We further find that the aggravating circumstances of this case outweigh any and all mitigating factors beyond a reasonable doubt. Finally, we find that the sentence of death is appropriate in this case, as it is neither excessive nor disproportionate to the penalty imposed in similar cases.

We, therefore, affirm Bies's convictions and the sentence of death imposed upon him.

KLUSMEIER, P.J., GORMAN and M.B. BETTMAN, JJ

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

[Entered March 30, 1994]

IN THE SUPREME COURT OF OHIO

On Appeal from the
Hamilton County
Court of Appeals,
First Appellate District

Case No. 94-1538
Court of Appeals No. C-920841
(Filed January 25, 1995)

MICHAL BIES,
Appellant,

v.

STATE OF OHIO,
Appellee.

EXCERPTS OF
MERIT BRIEF OF APPELLANT MICHAL BIES

Timothy J. Deardorff (0006308)
Loren S. Haas (0001848)
DEARDORFF & HAAS
2368 Victory Parkway
Suite 300
Cincinnati, Ohio 45206
(513) 872-7900
FAX: (513) 281-6760

COUNSEL FOR APPELLANT, MICHAL BIES

Joseph T. Deters (0012084)
HAMILTON COUNTY PROSECUTOR
William E. Breyer (0002138)
ASSISTANT PROSECUTOR
594 Hamilton County Courthouse
1000 Main Street
Cincinnati, Ohio 45202
(513) 632-8778

* * *

PROPOSITION OF LAW XXIII

> THE JUDGMENT OF THE TRIAL COURT, AS WELL AS THE JURY, THAT THE AGGRAVATING FACTORS OF WHICH APPELLANT WAS CONVICTED OUTWEIGHED THE MITIGATING FACTORS PRESENTED BY THE DEFENSE IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND TO THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION.

This Court is required by R.C. 2929.05 to independently weigh the evidence and to make its own determination of whether the aggravating factors outweigh the mitigating factors in a capital case. If the Court is required to undertake the procedures required under R.C. 2929.05, there is an initial observation presented by the facts of the case that this Court should consider.

The murder of Aaron Raines was certainly tragic. However, the aggravating factors with which the Appellant was charged have nothing to do with the innocence and frailty of the boy; the aggravation is that the killing was accomplished during the course of other felonies. Had Raines' murderer approached him at the park, and for no other reason, driven solely by perversity, malice, and a blood lust to take another human being's life, and committed the homicide in the same manner, this case would not be a capital case. It would be a most serious offense against the law and against Raines, but his killer would not even be death-eligible.

This Court, and all courts reviewing this case, must weigh the mitigation offered by Michael Bies, and indeed his own life, against the motive, not of blood lust, but of sexual satisfaction. That which Ohio law *requires* to be balanced against Appellant's life and the mitigation presented is *not* the victim's life and innocence, not the nature and circumstances of the offense, but the killer's sexual desires. While it would seem to some more just and appropriate that one who kills for sport or simply for the sake of killing, is more deserving of the ultimate sanction than one who kills another in the heat of passion, as occurred here, Ohio does not recognize such a priority.

The aggravating factors presented here, that the murder of Aaron Raines was committed while the perpetrators were attempting to commit other felonies, must be given their proper weight in light of the numerous mitigating factors presented by Michael Bies.

During the penalty phase of the trial, a psychiatrist who had tested Bies noted that his score on an intelligence test was a mere 69, which indicated that Appellant was mildly to moderately retarded. He tested at no more than a third to sixth grade level of maturity, and was in the bottom seven percent of the population in total intelligence (T.p. 1103-1104). Furthermore, he was diagnosed as having a personality disorder caused by "nonspecific brain damage which exhibits itself in these learning disabilities...and...in retardation" (T.p. 1117). He was characterized as "highly, extremely impulsive" and that he acts without thinking about what he is doing or the consequences that would result from his acts (T.p. 1120). this testimony clearly meets the mitigating factor expressed in R.C. 2929.04(B)(3), "whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Michael Bies, an abused, retarded twenty-year-old who was extremely impulsive and did not think before he acted on his impulse, clearly did not appreciate the criminality of his conduct.

Because of Appellant's limited mental capacity, he was easily coerced into doing acts which he though would impress an older authority figure. In fact, the record shows that Darryl Gumm initiated the crimes against Bies; no evidence was ever presented to the contrary. Because of Bies' limited mental capacity, he had a propensity for trying to please authority figures such as Gumm, who is much older than Bies, and for imitating his violent acts

(T.p. 1116). According to the state's own witness, Gumm was the one who lured the victim into the abandoned building; Gumm was the one who attempted to sexually assault the victim; Gumm was the one who carried the victim to the basement; and Gumm was the one who began to physically assault the victim (T.p. 871). Because of Appellant's lack of ability to understand what was happening and his willingness to please Gumm, Gumm was able to coerce and provoke Bies into harming Aaron Raines. This satisfies R.C. 2929.01(B)(2).

The third mitigating factor to be taken into account here is the youth of the accused pursuant to R.C. 2929.04(B)(4). Michael Bies was twenty years old at the time the incident occurred, but his mental age was that of, at best, a sixth-grader. The statute nowhere defines you, as a factor of mitigating, as a particular age; this Court should take into account the relative youth of Appellant psychologically and as compared to other adults.

The fourth mitigating factor, and arguably the most important one here, is Appellant's "lack of a significant history of prior criminal convictions and delinquency adjudications," as outlined in R.C. 2929.04(B)(5). The convictions herein were Appellant's first criminal convictions of any sort, whether in juvenile or adult courts (T.p. 1116-1117). Although he had problems in various schools and had exhibited some antisocial behavior in the past, he had never been convicted of any crime. Ordinarily the lack of any prior convictions weighs heavily in mitigation for any defendant who has been convicted of his first offense; here, the trial court

deviated from a standard criminal sentencing practice and decided to put Michael Bies to death. This penalty is unconscionable, and should not be allowed to stand.

Finally, the nature and circumstances of the case, when weighed against the aggravating factors, should lead this Court to reverse Michael Bies' sentence of death by electrocution. The testimony of the state's witnesses clearly evidenced that Appellant was a secondary actor in the commission of this horrible crime. Darryl Gumm formulated the plan to capture the victim for the purpose of eliciting sex from him, and Appellant went along with it. Darryl Gumm lured his victim into the building, and Bies went along with it. Darryl Gumm attempted to have sex with Raines, and Bies stood by and watched. Darryl Gumm decided to kill Raines, and Bies went along with it. Quite obviously, Gumm was the leader of the two; although Bies might deserve punishment for his actions, he should not be put to death by the state.

Various courts in Ohio have held that when each of the mitigating circumstances presented in a case are argued *alone*, they are not strong enough to outweigh the aggravating circumstances of each case. In *State v. Evans*, 63 Ohio St.3d 231 (1992), the fact that the defendant had an I.Q. of 64 did not preclude a death sentence. In *Evans*, the Ohio Supreme Court noted that the evidence reflected that the defendant was in charge of the entire incident. Testimony elicited at his trial indicated that the defendant have orders and initiated the events by first producing a gun and then holding it to the head

of the victim. *Id.* at 244. Additionally, there was a report form a psychiatrist that the defendant could function well in a job, at prison and at home. clearly the above reasoning would not apply to Michael Bies, as the testimony of the psychiatrist was that Bies had the maturity level of a third-grader; third-graders cannot function well in jobs, at prison, or in the home. This Court in *Evans* used these factors to deny the defendant's assignment of error that it would be unconstitutional to execute someone with an I.Q. of 64; however, the *Evans* argument that people with low intelligence who *cannot* function reasonably in society remains unresolved.

In *State v. Van Hook*, 39 Ohio St.3d 256 (1988), this Court found that the fact that the defendant was diagnosed as having a "borderline personality disorder" did not amount to a factor in mitigation under R.C. 2929.04. The Court based its decision on evidence that the defendant had no mental disease or defect which prevented him form conforming his conduct to the requirements of the law. As a basis for that ruling, the Court stated that even with his borderline personality disorder, the defendant was able to live and work within a community and society in a peaceful fashion when he chose to do so. The court even stated, "the Defendant functioned as a rational human being." *Id.* at 264. In this case *sub judice*, the prosecutor characterized Michael Bies as a ruthless, uncaring, savage character since he was three years old (T.p. 1170-1180). Thus, Appellant surely could not live and work in a community in a peaceful fashion when he chose to do so nor be considered a "rational human being." Clearly, the argument raised in *Van Hook*

cannot be applied to the case at bar. Thus, Michael Bies' borderline personality disorder must be considered a mitigating factor under R.C. 2929.04(B)(7). The trial court failed in its sentencing opinion to consider this disorder (T.d. 129, Opinion). As a result, this Court must consider Appellant's low I.Q. as combined with the borderline personality disorder, which together outweigh the aggravating circumstances of felony-murder.

This Court must also consider Appellant's relative youth when assessing the weight of the mitigating factors. In *State v. Cooey*, 46 Ohio St.3d 20 (1989), this Court held that the weight to be given to a defendant's age as a mitigating factor is to be considered by the trial court on a case-to-case basis. In *Cooey*, the defendant was nineteen years old. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the United States Supreme Court held that the chronological age of a minor is itself a mitigating factor of great weight. In the present case, the trial court noted that the "defendant was old enough to know the wrongness of his acts." (T.d. 129, Opinion, p.6). This is simply wrong; the only evidence as to age in the mitigating phase was that of Dr. Donna Winters, who testified that "in terms of his ability to think clearly, logically, he's somewhere from the age of a third grader to a sixth grader (8-11 years]" (T.p. 1116). Under *Eddings*, the fact that Appellant is the equivalent of an 8-11 year old should have been accorded tremendous weight; however, it was given no weight whatsoever by the trial court. When weighing age as a mitigating factor, the trial court failed to consider R.C. 2151.26(A)(1)(a), wherein a person under the age of fifteen cannot even be

prosecuted for a capital murder in the Court of Common Pleas. *See also Thompson v. Oklahoma*, 487 U.S. 815 (1988). Except for physical age, in every other respect Michael Bies is an 8-11 year old boy. Failure to take this into account resulted in an unreliable sentencing proceedings and reversible error.

In summary, Michael Bies' low I.Q., his personality disorder, young mental age, and possible organic brain disorder (T.p. 1102-1103) in combination clearly outweigh the aggravating circumstances presented by the state. These factors have been considered in previous Ohio cases on an individual basis; however, no prior case deals with the combination of mitigating factors such as those presented here. The trial court erred by weighing these factors individually, as noted in the court's sentencing opinion. Had the court weighed the factors together against the aggravating circumstances, the court never would have sentenced Michael Bies to die in the electric chair.

IN THE SUPREME COURT OF OHIO

On Appeal from the
Hamilton County
Court of Appeals,
First Appellate District

No. 94-1538
Court of Appeals No. C-920841
(Filed March 8, 1995)

STATE OF OHIO,
Plaintiff-Appellee,

v.

MICHAEL BIES,
Defendant-Appellant.

EXCERPTS OF
MERIT BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters (0012084P)
Prosecuting Attorney
William E. Breyer (0002138P)
Assistant Prosecuting Attorney
Counsel of Record
914 Main Street, Suite 500
Cincinnati, Ohio 45202
(513) 632-8778
Fax No. (513) 632-7347

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

Timothy J. Deardorff, Esq.
2368 Victory Parkway, Suite 300
Cincinnati, Ohio 45206
(513) 872-7900

COUNSEL FOR DEFENDANT-APPELLANT,
MICHAEL BIES

* * *

PROPOSITION OF LAW XXII

A DEATH PENALTY IS PROPERLY IMPOSED WHERE THE TRIER OF FACT DETERMINES BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS.

ARGUMENT

In his proposition of law, the defendant argues that the jury and the trial court erred in finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. Of course in every capital case, this court is required by statute to perform such a review. R.C. 2929.05 *Appeals; procedure.*

The gist of the court's responsibility here is a weighing of the evidence process. The court must compare the aggravating factor with the evidence adduced in mitigation, and in this process must review the nature of the offense and the defendant's character, etc.

In the present case, the defendant was convicted on three specifications: (1) that the offense

was committed to escape apprehension; (2) that the offense was committed during an attempted rape; and (3) that the offense was committed during a kidnapping. The nature of these aggravating factors have been set forth in the presentation of facts and need not be repeated here. The mitigation presented was that the defendant was supposedly retarded and/or low intelligence, that he was young, that he had an abused and deprived childhood and that he possibly had "non-specific brain damage" which caused him to have a borderline personality disorder.

The evidence for all of these conclusions is found in the testimony of psychologist Donna Winter, who testified on behalf of the defendant at mitigation. However, the weight to be given this testimony is tempered by the actual facts presented at trial. Thus, though the defense team argued that Bies had the mind of a third grader, and thus should not be held accountable, the record is somewhat contrary.

The record shows that this defendant was married and divorced and had children. He went to the tenth grade in school. He could drive a car. He traveled about the midwest [Hazard, Cincinnati, Chicago, Indiana, Lexington] and functioned well enough to do this on his own. The defendant was able to write out a statement and read it to the jury. The mental status exams revealed that he knew right from wrong and could conform his conduct to meet the law if he so desired. (T.p. 1138-1140) Thus, the weight given to the testimony of Dr. Winter must be tempered with the actual knowledge of the defendant's actions.

Defendant argues that the trial court disregarded his youth as a mitigating factor. This case in that regard is similar to *State v. Byrd*, 32 Ohio St.3d 79, __ N.E.2d __ (1987). In *Byrd*, the Supreme Court wrote:

> "Additionally, defendant contends that the trial court erred in its finding that his young age was not a mitigating factor. The trial court, in its opinion, stated:
>
> '(4) "The youth of the offender." The court finds that the defendant was at the time of his trial [*sic*] 19 years of age, the oldest 19 year old this Judge has ever seen. There is no evidence to suggest that his age was a factor that should be taken into account in mitigating of the sentence of death.'
>
> This is a permissible finding for the trial court to make. Although R.C. 2929.04(B) lists youth as a factor to be considered, it does not require anyone under a certain age to be absolved of culpability for his crime. As the trial court observed, there was no evidence presented to suggest that Byrd's age was of any relevance in the crime or sentence of death. Accordingly, the second proposition of law is without merit."

Defendant argues that he was led into this crime by the co-defendant. This is not accurate. Defendant confessed to Gary Seal that he was a willing participant in this offense. Further, the evidence produced at trial was that Gumm was *not* a leader, he was a follower. (T.p. 532)

Defendant next argues that the trial court failed to give mitigating value to his lack of a prior criminal record. This is untrue. The court recognized the defendant did not have a significant record. (Op. p. 6) However, contrary to what defendant says, the existence of some mitigation does not require a life sentence. As long as mitigating is properly outweighed by aggravation, death is appropriate. *State v. Davis*, 62 Ohio St.3d, 326, __ N.E.2d __ (1991); *State v. Evans*, 63 Ohio St.3d 231, __ N.E.2d __ (1992); *State v. Murphy*, 65 Ohio St.3d 554, __ N.E.2d __ (1992).

The evidence presented in this case clearly shows a defendant who deserves death by electrocution. The aggravating factors far outweigh the mitigation presented. This Court has its own statutory duty in this area, and of course its conclusions will be controlling here.

IN THE SUPREME COURT OF OHIO

On Appeal from the
Hamilton County
Court of Appeals,
First Appellate District

Case No. 94-1538
Court of Appeals No. C-920841
(Filed April 17, 1995)

MICHAL BIES,
Appellant,

v.

STATE OF OHIO,
Appellee.

EXCERPTS OF
REPLY BRIEF OF APPELLANT MICHAEL BIES

Timothy J. Deardorff (0006308)
Loren S. Haas (0001848)
DEARDORFF & HAAS
2368 Victory Parkway
Suite 300
Cincinnati, Ohio 45206
(513) 872-7900
FAX: (513) 281-6760

COUNSEL FOR APPELLANT,
MICHAEL BIES

Joseph T. Deters (0012084)
HAMILTON COUNTY PROSECUTOR

William E. Breyer (0002138)
ASSISTANT PROSECUTOR
594 Hamilton County Courthouse
1000 Main Street
Cincinnati, Ohio 45202
(513) 632-8778

COUNSEL FOR APPELLEE,
STATE OF OHIO

* * *

PROPOSITION OF LAW XXIII

APPELLANT'S RESPONSE TO APPELLEE'S CONTENTION THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, THUS SUPPORTING APPELLANT'S SENTENCE OF DEATH.

This Court is required by R.C. 2929.05 to independently weigh the evidence presented at trial and to make its own determination of whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt before affirming a sentence of death.

The facts outlined by the Appellee (Appellee's brief, p. 65) do not show that the Appellant had the mental capacity of an adult; any child in the sixth grade could have sex and find his way around the Midwest. Although Phyllis Thacker, a witness for the State and one of Junior Gumm's close friends. testified that Gumm "could never be a leader", the Appellee takes her statement out of context when considering the mitigating factors apparent here. When reciting Gumm's personal history, her

statement goes to show that he would not be a leader in the society, and does not indicate that he was incapable of coercing the Appellant to undergo criminal activity. In fact, the State's evidence proves beyond doubt that Gumm was the leader in commission of the crime (T.p. 871). The State's own evidence thus satisfies R.C. 2929.04(B).

The Appellee then argues that the youth of the appellant should not be considered, and cites *State v. Byrd*, 32 Ohio St.3d 79 (1987) for the proposition that when there is no evidence to suggest that a defendant's age was a factor in the crime or the sentence of death, it should not be taken into account. In Byrd, there was no such evidence; in fact, the trial court there pointed out that the defendant was "the oldest 19 year old [he] has ever seen." That case is in no way analogous to the present situation. Here, testimony was presented that the Appellant's mental age was that of a third- to sixth-grader (T.p. 1103-1104). Therefore, he was a very young and immature person at the time the crime was committed. For this reason, his youth weighs heavily in mitigation.

The evidence presented in this case was clearly weighed improperly by the trial court. When weighing the aggravating factors against the mitigating factors, it is clear that the Appellant does not deserve to be killed by the State of Ohio.

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B925607
Death Penalty Case
Evidentiary Hearing Requested
(Filed September 24, 1996)

MICHAEL BIES,
Petitioner

v.

STATE OF OHIO,
Respondent.

EXCERPTS OF PETITION TO VACATE OR SET ASIDE JUDGMENT AND/OR SENTENCE PURSUANT TO OHIO REV. CODE ANN. § 2953.21 INCLUDING EXHIBITS A-G

S. SCOTT HAYNES – 0059586
Counsel of Record
Hallows, Allen and Haynes
1616 Brice Road
Reynoldsburg, Ohio 43068
(614) 868-0009

AND

J. JOSEPH BODINE, JR. – 0042132
Assistant State Public Defender
Of Counsel
Office of the Ohio Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

COUNSEL FOR APPELLANT

* * *

45) As a result of these actions, Petitioner's rights as guaranteed by the following provisions of the Constitution of the United States were violated: 1) the prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment; 2) substantive due process and other unenumerated rights guaranteed by the Ninth Amendment; 3) the due process and equal protection clauses of the Fourteenth Amendment; 4) the right to trial by an impartial jury and the right to the assistance of counsel guaranteed by the Sixth Amendment; and 5) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

46) Petitioner's same rights were violated as guaranteed by Sections 1, 2, 5, 9, 10, 16 and 20 of the Constitution of the State of Ohio.

47) For these reasons, the convictions and sentences imposed upon Mr. Bies are void and must be reversed.

48) Petitioner Bies requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

FIFTH CLAIM FOR RELIEF

49) Petitioner Bies hereby incorporates paragraphs one (1) through forty-eight (48) of this complaint as if fully rewritten herein.

50) Executing a mentally retarded person is

cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

51) A mentally retarded person does not possess the blameworthiness and moral culpability necessary to impose the death penalty. *Edmund v. Florida*, 458 U.S. 782 (1982).

52) Mental retardation is a substantial disability which impairs an individual's capacity to understand and control his actions. *Penry v. Lynaugh*, 492 U.S. 302, 337 (1989); citing ABA Standards for Criminal Justice 7-9.3, commentary at 463.

53) Mentally retarded defendants are comparable to the common law "idiot" who was not morally responsible for his crimes.

54) Mentally retarded individuals were known as "idiots" under common law. The M'Naughten test for insanity applied to common law "idiots" and mentally retarded individuals. *Regina v. Higginson*, 174 Eng. Rep. 743 (1843).

55) A national consensus against executing the mentally retarded reflects the new standard of decency in the United States.

56) As a result of these actions, Petitioner's rights as guaranteed by the following provisions of the Constitution of the United States were violated: 1) the prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment; 2) substantive due process and other unenumerated rights guaranteed by the Ninth Amendment; 3) the due process and equal protection clauses of the Fourteenth Amendment; 4) the right to trial by an impartial jury and the right to the assistance of

counsel guaranteed by the Sixth Amendment; and 5) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

57) Petitioner's same rights were violated as guaranteed by Sections 1, 2, 5, 9, .10, 16 and 20 of the Constitution of the State of Ohio.

58) For these reasons, the sentences imposed upon Mr. Bies are void and must be reversed.

59) Petitioner Bies requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it relates to this claim would amount to a denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

SIXTH CLAIM FOR RELIEF

60) Petitioner Bies hereby incorporates paragraphs one (1) through fifty-nine (59) of this complaint as if fully rewritten herein.

61) The Hamilton County Police Department violated Petitioner's rights by establishing standards of practice regarding interrogations that violated the standards of *Miranda v. Arizona*, 384 U.S. 436 (1966).

62) The United States Supreme Court established specific guidelines known as the Miranda Rule. *Michigan v. Tucker*, 417.U.S. 433, 443 (1974).

63) The Hamilton County Police Department did not follow these guidelines when interrogating Petitioner.

64) A police department may establish a policy through practice that can constitute a custom or

usage with the force of law. *Andickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970).

65) Police departments are responsible for training their employees on their policies and for performing their duties. *City of Canton v. Harris*, 489 U.S. 378, 388 (19--).

EXCERPTS TO EXHIBIT TO PETITION, REPORT AND RECOMMENDATION OF LYNN DANIEL-MORROW

(Dated July 22, 1982)

* * *

SUMMARY OF CONTACTS (continued)

Telephone Contacts

Paul Jakura	5/27/82

On-Site Contacts

Linda Bies 2704 W Giddings Chicago, Illinois No phone	5/7/82
Linda Bies	5/10/82
Linda Bies Karen Peano Mildred Blankenship Michael Bies Richard Bies Sheri Biess Lucky Jointer	5/13/82

FAMILY DESCRIPTION

Ms. Linda Bies, 30, lives in a 2-bedroom basement apartment with her 3 children: Richard; 11; Michael, 10; and Sheri Lynn, 8. A scruffy dog also resides consistently with the family. During the couple of months I was involved with this family, Karen Peano, 21, Linda's half-sister, appeared to

move into the Bies apartment for about a month. Linda's "fiancé", Nathan Jointer III, appeared to move out of the apartment, and "Lucky", Linda's previous lover and current lover of Karen, appeared to be living in the Bies apartment part-time. Lucky's brother, also a previous lover of Linda's, may also have been residing in the Bies apartment for part of the time.

Linda's "mother", Ms. Mildren Blankenship, 42, also moved into the same apartment building during the couple of months I was dealing with this family. Ms. Blankenship appeared to be taking care of Becky, 2, and Angel, 1, her grandchildren whose father, David Blankenship, is a janitor at a building at 917 Eastwood.

Children and adults in this extended family seem to move freely from apartment to apartment, considering any place where there's a relative to be home. Lovers, previous lovers and "friends" also seem to move freely through the family apartment.

This is a second generation, white welfare family that is essentially matriarchal in structure. The men in the family seem to do stints in jail (Linda's brother, Raymond Irving Peano, is presently serving time for arson in Marquette County Jail in Michigan) and wander from woman to woman. Linda's lovers seem to follow a similar pattern. Linda's previous lovers I met in the course of my visits either had some disability or were black or both.

My impression is that the Bies extended family is an organic mass that follows its members. For instance, Linda moved to break away from her

family when she formed the relationship with her present fiancé. Within a few weeks, her half-sister had moved in with her, then her mother moved into the same building, then Linda's nieces moved in and then previous lovers and friends seemed to follow.

Linda's apartment seemed furnished adequately, but shabbily. It stank of urine, and although was picked up, seemed dark, damp and grimy dirty.

CLIENT CONTACT

On my first visit to Ms. Bies's apartment, she met at the door, but neglected to ask me inside. We talked for several minutes at the doorway before I asked if we could step inside to continue our conversation.

Initially Ms. Bies impressed me as possessing few social skills, but being intelligent, stressed by her financial situation (she had been cut off welfare) and operating in what she saw as the best interests of her children. During this interview, Ms. Bies told me how Richard's and Michael's father had abused them and her, how she had left these men even though it meant going on welfare to keep her children safe. She explained how difficult a parenting job she had as Richard has epilepsy, and Michael is emotionally disturbed as well as having allergies, bronchitis and asthma. Sheri has had numerous ear infections with apparently some hearing loss and is asthmatic and has been hospitalized for dehydration and pneumonia. Ms. Bies herself was in a car accident in 1979 and reported nerve damage to the lower part of her back. She has been placed in traction in a hospital to

alleviate the pain. All in all, considering that the family at that time had no income and numerous physical ailments, Ms. Bies felt they were doing well just to survive.

We then discussed Michael's behavior and Ms. Bies's handling of it. She complained about his "dirty language", his physical assaults on Sheri, his whining, his tearing up the house, etc. Ms. Bies said she handled Michael's behavior in different ways: takes away TV, makes him stand in a corner, sit on a chair, washed out his mouth with soap, and hits him with a belt.

All in all, I came away from this first interview feeling that although Ms. Bies was not a middle class or effective parent, she was trying and was not legally abusing her children. My perception radically changed during my second interview when I observed interaction between Ms. Bies and Michael.

Ms. Bies and I were talking as Michael came in. Ms. Bies asked Michael how was in school today. Michael proudly said he had been good and "not done one wrong thing all the way to bus time." Ms. Bies then jerked him onto her lap and slapped him saying, "Yesterday you were a brat." Michael flinched and attempted to arrange himself on her lap, putting a foot on the coffee table. Ms. Bies slapped him on the chest saying not to put his foot on the coffee table. Michael flinched again and asked her to let him go. She slapped him again on the arm for being "snotty."

Ms. Bies then told me that Michael was too skinny, "born that way and always will be that way.

He's nothing like his brother." She then turned to Michael stating, "Your brother is nothing like you. You're a devil, possessed by evil, and your brother is an angel." At that point, Michael began fidgeting in his mother's lap. Ms. Bies asked Karen (Ms. Bies's sister), who had just walked into the room, to hand her "the belt", an approximately 1 ¼' belt with buckle that had been placed on an end table on the other side of the room. Karen did so with a broad smile saying, "Mike, you're ignorant . . . you want the belt now or later?" Michael fidgeted again, and Ms. Bies told him that he could not leave the house to go to the park for a week. She then told him to stand in the corner.

About that time, Ms. Mildred Blankenship walks in holding Becky, Michael's cousin, 2. Michael asked to hold Becky. Ms. Bies slaps him on the arm and restrains him from leaving her lap with the other arm. She explains to her mother, Ms. Blankenship, that Michael is being bad again. Ms. Blankenship says to Michael that he should be hung by his toes until he's dead – "perhaps that would teach you." Michael again fidgets, and Ms. Bies along with Karen physically pull Michael to a chair across the room. Michael struggles somewhat to get away, but seems to be careful not to hurt anyone. Ms. Bies shoves Michael in the chair, picks up the belt, raises the belt and yells at him, "You're just like your father, someday you're going to kill someone or yourself. You move from that chair and you get the belt." Michael begins rocking in the chair, hitting his head up against the back of the chair.

Ms. Bies then yells out Michael's misbehavior:

"he's up at the crack of dawn and goes out to play . . . I could get arrested for child neglect if the police pick him up . . . he lights matches . . . he could burn us all up . . . they told me at Michael Reese years ago that Michael's capable of killing someone . . . he's tried to kill Richard . . . he tried to bash his skull with a hammer . . . and he's cut his own wrists . . . throws himself out of the school bus door when the bus is traveling . . . hits his head up against brick and concrete walls . . . he jumped out the window once . . . you see what a job it is to take care of a looney . . ." Michael yells, "Shut up." at this point and Ms. Bies slaps him across the face and drags him out of the room, saying he's going to get the belt now. Michael looks terrified, but does not resist. The room quiets as Karen and Ms. Blankenship smile and listen for the sound of the belt hitting Michael. I hear Ms. Bies scream, "Bend over! Bend over!" Then I hear 4 wallops. When Michael and Ms. Bies return, Michael has tears in his eyes and rage in his manner. Ms. Bies throws him into the chair and tells him if he moves, he'll get it again. Michael says, "You hate me, don't you? You are the badest mother I ever had." Ms. Bies slaps him across the face.

At this point in the interview, I request Ms. Bies accompany me outside, so we can talk privately. Ms. Bies hands the belt to Karen saying, "Bust his butt if he moves." Michael begins hitting his head up against the back of the chair.

I tell Ms. Bies that I am exhausted and enraged just watching the two of them interact, and I imagine she must care very much about having Michael turn out differently than his father in prison

to put so much into his discipline. Ms. Bies says she does care, and we discuss what she's done for Michael in terms of having him hospitalized . . . first at age 5 at Michael Reese, and several psychiatric hospitalizations at Ridgeway when he was cutting his wrists and jumping out the window. We discuss residential treatment. Ms. Bies says everyone wants to take Michael away from her, but she has felt the best place for him is with his family. We then discuss her fear of Michael killing himself or other family members. I tell Ms. Bies I will report how much it takes to control Michael to the IDCFS hot line, and Ms. Bies agrees to think about residential placement for Michael as she knows she'll not be able to control him in another couple of years.

We go back to the living room where Michael remains in the chair, and Karen is pacing back and forth in front of him with the belt. Sheri comes into the room with Lucky, a tall, strong appearing black man with only one eye. Ms. Bies instructs Sheri to be a good girl -- "not a brat like Michael." Lucky asks if there is any problem, eyeing Michael. Michael cowers in the chair, looking terrified. Karen hands Lucky the belt. Ms. Bies tells Lucky that Michael's been very bad. Again, the room quiets as Lucky slowly swings the belt back and forth, eyeing Michael. Suddenly, Lucky hits the floor with the belt hard and strong. The noise is sudden and loud and I have a startled reflex. Everyone else is smiling at Lucky's strength and Michael's cowering. Lucky says, "I don't want to use this while the ladies are here because I don't want to go back to prison . . . but I will if you force me, Michael . . . you say one word, Michael, and you get the belt."

I end the interview, and Lucky walks me out. I ask him how often and how he actually uses the belt. Lucky explains that he doesn't like to use it too often, because he can't always control the blows and although he covers Michael's body parts he hits to prevent leaving marks, marks are almost always left. So, he just has to actually hit Michael once every few months now. The rest of the time he just scares and threatens him.

All in all, I felt shaken leaving that interview. What impressed me most was that there was absolutely no positive reinforcement for Michael and that he seemed to live in fear like a caged animal.

PROBLEM ASSESSMENT

From Ms. Bies's point of view, she has given her life to controlling Michael as a mother should. She says she could work if she didn't have to watch Michael every minute. She is afraid Michael will kill one or more family members if she does not watch him. Or he will kill himself. However, Ms. Bies also knows that she will not be able to control him physically much longer. (Michael is small for his age due to his various illnesses, including encephalitis, according to Ms. Bies.)

Ms. Bies sees herself as a good mother who is mothering in spite of the stress of having no money, children with various diseases and handicaps and her extended family that encourages her to discipline Michael more strongly. It is clear that Ms. Bies is strongly bonded with Michael, and I feel could be turned to place him if she saw her placing him as being the good, selfless mothering thing to do.

From the extended family's point of view, blood should take care of blood relations. They seem to feel that Ms. Bies has not been strict enough with Michael, and he needs more punishment. They do not think Michael should be placed as he is a blood relation, and no one can control him if his family cannot. (Lucky evidently was placed in Juvenile Home from the time he was 11 and says it did not keep him out of jail as an adult.)

From the school's point of view, Michael is being severely abused and neglected at home. They have seen black eyes, bruises and welts which are documented (see Neumann reports), as well as instances of neglect. They feel Michael should be placed for his protection.

Other collaterals also seem to agree that placement is needed to protect Michael. Loyola Child Guidance psychiatrist Trujillo reportedly recommended that all 3 children be placed as no progress could be made with Michael as long as he remained with his mother.

Ridgeway examining psychologist states that "massive intervention is necessary (for Michael) and it seems unlikely that this boy can respond effectively given continued exposure to the same chaotic living circumstances." Dr. Perkinson ends his report by stating that "the chaotic living situation, inconsistent mothering, and the internalization of an image of himself as physically and emotionally defective all likely contribute to the agitation and explosiveness and anxiety seen in this boy." A psychiatric consultation states that Michael "is symbiotically attached to his mother, and the

most effective way to help this child is to separate the child from the mother physically."

From IDCFS's standpoint, Michael is being physically abused and documentation of this abuse can be obtained from the Neumann School. IDCFS has received reports of neglect from hospitals and schools since Michael was 5 years old. This is a chronic abuse case, and long term placement planning is now in order, and Ms. Bies should be worked with by IDCFS caseworker to understand that although placing Michael is hard for her to do, it is what Michael and her family need to insure the safety of everyone in the family as Michael physically becomes uncontrollable. Long term residential treatment settings such as the Orthogenic School should be approached as possible placement for Michael as Ms. Bies comes to request placement. Because of the symbiotic bond between Ms. Bies and Michael, I believe that time and sensitivity must be taken to enlist Ms. Bies's support of the placement plan or Ms. Bies will successfully sabotage the placement.

From my point of view, this is one of the most brutal child abuse cases I have evaluated. Although there was plenty of physical abuse that I witnesses firsthand, the brutality which I found most shocking was the lack of any positive reinforcement. When Michael said he had done well that day in school, he was slapped because he hadn't the day before. When he sat quietly, he was talked about as ignorant and the evil, waiting for his chance to act out. He is trapped like an animal in his own home and attached to his brutal master the way a beaten dog follows his

master faithfully.

I believe that Michael has such explosive rage at the present time that he is capable of killing family members and himself. His small stature and Ms. Bies's constant control is all that is standing between Michael and lethal violence. Both of these factors will be eliminated in a few years. Therefore, I feel IDCFS should begin working immediately towards intensive long term treatment placement to avert lethal violence in the Bies home in a few years.

CASE PLAN RECOMMENDATION

I recommend that this case be opened by IDCFS and that a long term, multi-service worker be assigned to work with Ms. Bies towards placement of Michael.

I feel it is important that IDCFS worker enlist Ms. Bies's trust by supporting her caring for Michael and acknowledging that there is nothing more she can do for him once he reaches a certain physical size. Also, her fears that Michael may kill himself and/or other family members should be supported. If placement is framed positively, Ms. Bies will probably support it inconsistently. Once Michael is placed, Ms. Bies should be involved in outreach therapy to help her with her parenting of her other children.

Michael should be given a complete physical examination, including x-rays, to determine whether bones have been broken and reasons for his small stature. Psychological testing and neurological testing should also be done in preparation for proper placement. During this pre-placement interval,

placement should be played down to Michael if he is going to continue with the structure of Neumann School which he needs. (Michael should be told simply that for the time being, he is going to remain at home with his mother and the Neumann School.) If Michael focuses on placement, I believe he will "explode" prior to the actual placement and be suspended from Neumann School, the structure of which both Michael and Ms. Bies rely heavily upon.

If this happens, Michael may need to be hospitalized on an emergency basis prior to placement.

Respectfully submitted

Lynn Daniel-Morrow

LDM:mw
July 22, 1982

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

Case No. B-925607
(Filed November 22, 1996)

STATE OF OHIO,
Plaintiff-Respondent

v.

MICHAEL BIES,
Defendant-Petitioner.

EXCERPTS OF STATE'S
MOTION FOR JUDGMENT
PURSUANT TO O.R.C. 2953.21(C)

* * *

(1) Defendant's final claim here is that trial counsel failed to request expert assistance to challenge the state's procedures in collecting physical evidence. Defendant presents no explanation as to why this was necessary, or how the failure to do so prejudiced him. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (1991). Absent such a preliminary showing, this claim must be rejected. *State v. Bradley*, 42 Ohio St.2d 136, 538 N.E.2d 373 (1989).

(E) Defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. The record reveals defendant to be mildly mentally retarded with an I.Q. of about 69. As a matter of law, such a person may be punished by execution. *State v. Holloway*, 38 Ohio St.3d 239

(1988).

(F) Defendant's sixth claim for relief is that the "Hamilton County Police Department" violated his Miranda rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). This claim was raised at trial and on appeal, and is therefore barred by res judicata. *State v. Perry*, 10 Oho St.2d 175 (1967).

(G) Defendant's seventh claim for relief is an allegation that he was improperly arrested in Kentucky, on an Indiana warrant, and thereafter questioned on an Ohio charge. Defendant provides no evidentiary documents to show that there was no Indiana warrant. Instead, he argues that the arrest on the Indiana warrant prevents questioning concerning other crimes. This is an incorrect statement of law. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975); *Dayton v. Erickson*, 76 Ohio St.3d 3 (1996), and this claim for relief must be rejected.

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

Case No. B-925607
(Entered July 22, 1998)

STATE OF OHIO,
Plaintiff-Respondent,

vs.

MICHAEL BIES,
Defendant-Petitioner.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ENTRY DISMISSING PETITION TO VACATE

This matter is before the Court on the defendant's Petition to Vacate, and the State's motion for judgment pursuant to R.C. 2953.21(C). The Court determines that all issues can be resolved without an evidentiary hearing, and that therefore discovery is not appropriate.

The defendant's petition to vacate contains fifteen claims for relief, each of which will be disposed of individually.

I. The defendant's first claim for relief is an allegation that the court improperly relied on a victim impact statement in imposing sentence. As to this claim the Court makes the following Findings of Fact:

(1) The defendant was sentenced on other offenses besides the aggravated murder count.

(2) The Court's sentencing rationale is set

forth in the statutorily required sentencing opinion, which contains no reference to a victim impact statement.

The Court makes the following Conclusions of Law:

(1) This claim is refuted by the record since the sentencing opinion reflects that the victim impact statement was not considered in imposing the death penalty.

(2) Any error in the sentencing process was corrected by the de novo review by the Court of Appeals and the Ohio Supreme Court. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990).

II. The defendant's second claim for relief is an allegation of ineffective assistance of counsel at the mitigation hearing. Specifically, defendant contends trial counsel did not call enough witnesses. Defendant supports this claim by reference to additional, largely cummulative, evidence that was not presented at mitigation. As to this claim, the Court makes the following Findings of Fact:

(1) At the mitigation hearing, the defendant made an unsworn statement, and the testimony of Dr. Winter, a clinical psychologist was presented.

(2) Dr. Winter interviewed the defendant several times, and administered several tests to him. [T.p. 1092-93]. Dr. Winter obtained defendant's records of his past history, including psychiatric hospitalizations and other evaluations from Chicago. The social worker assisting Dr. Winter spoke to the defendant's mother. Dr. Winter, or those under her direction, also spoke to the prosecutor, defense

counsel and defendant's girlfriend. Dr. Winter also viewed the crime scene walk-through tape, and heard defendant's taped statement.

(3) Dr. Winter presented the jury with a thorough and detailed life history of the defendant.

The Court makes the following Conclusions of Law:

(1) Trial counsel performed in an effective manner at mitigation, presenting a well thought out mitigation theory supported by ample testimony.

(2) Offering cummulative evidence or alternative theories of mitigation does not substantiate a claim of ineffective assistance at mitigation. *State v. Combes*, 100 Ohio App.3d 90, 652 N.E.2d 205 (1994).

(3) The new material offered by defendant would not have changed the outcome of the mitigation hearing. *State v. Bradley*, 42 Ohio St.2d 138, 488 N.E.2d 373 (1989).

III. Defendant's third claim for relief is a claim of ineffective assistance of counsel at mitigation. In particular, defendant argues that trial counsel failed to adequately address the issues of "mental retardation" and "organic brian damage". As to this claim, the Court makes the following Finding of Fact:

(1) Trial counsel obtained the services of Dr. Winter, a clinical psychologist, who examined defendant for retardation and organic brain damage. [T.p. 1092-93]

(2) Dr. Winter testified that defendant did have some brain damage. [T.p. 1102]

(3) Dr. Winter testified as to the degree of retardation present in defendant. [T.p. 1103]

The Court makes the following Conclusion of Law:

(1) This claim is refuted by the record, which demonstrates that trial counsel thoroughly explored these areas.

IV. The defendant's fourth claim for relief is another claim of ineffective assistance of trial counsel. In it defendant raises twelve (12) specific claims, each of which will be dealt with individually.

(A) Defendant first claims that trial counsel were ineffective for failing to challenge his confession on grounds that he was retarded. As to this claim, the Court makes the following Finding of Fact.

(1) The record reflects that defendant is mildly mentally retarded, but that he is capable [and has] of living and functioning on his own.

(2) The record demonstrates no instance of police misconduct in obtaining the confession.

(3) This issue was considered by the Ohio Supreme Court on direct appeal. *State v. Bies* 74 Ohio St.3d 320 (1996).

The Court makes the following Conclusions of Law:

(1) Defendant's degree of retardation is not such that would cause suppression. There has been no showing of police misconduct. Therefore, this claim must fail. *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515 (1986).

(2) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(B) Defendant's second claim is that trial counsel failed to introduce evidence of retardation at mitigation. As to this claim, the Court makes the following Findings of Fact:

(1) Trial counsel did introduce evidence regarding retardation at mitigation.

The Court makes the following Conclusion of Law:

(1) As a matter of law, this claim must fail because it is refuted by the existing record.

(C) Defendant's third claim is that trial counsel failed to produce testimony regarding organic brain damage and rage syndrome at mitigation. As to this claim, the Court makes the following Finding of Fact:

(1) The areas were covered in mitigation by the testimony of Dr. Winter. [T.p. 1102, 1107 et seq.]

The Court makes the following Conclusion of Law:

(1) As a matter of law, this claim must fail because it is refuted by the existing record.

(D) Defendant's fourth claim is that trial counsel, at mitigation, failed to adduce testimony regarding the defendant's childhood. As to this claim, the Court makes the following Finding of Fact:

(1) At mitigation, defense witness Dr. Winter, testified extensively about the defendant's troubled childhood.

The Court makes the following Conclusion of

Law:

(1) As a matter of law, this claim must fail because it is refuted by the existing record.

(E) Defendant's fifth claim here is a restatement of his first claim for relief regarding the alleged use of the victim impact statement. The Court adopts here its response to the defendant's first claim for relief.

(F) Defendant's sixth claim fails to raise an issue for review.

(G) Defendant's seventh claim is that trial counsel did not object to the trial court's charge on "principal offender and the prior calculation and design components to the capital specification." As to this claim, the Court makes the following Findings of Fact:

(1) The trial court's charge on principal offender and prior calculation and design was given to the jury at T.p. 1032, 1041, 1042.

The Court makes the following Conclusion of Law:

(1) The charge at issue, given to the jury, was a correct statement of law and counsel had no duty to object thereto.

(H) Defendant's eighth claim is an allegation that trial counsel failed to object to instances of prosecutorial misconduct. As to this claim, the Court makes the following Findings of Fact:

(1) Defendant does not identify any specific instances of misconduct.

(2) A claim of prosecutorial misconduct was

raised on direct appeal to the Ohio Supreme Court. *State v. Bies*, 74 Ohio St.3d 320 (1996).

The Court makes the following Conclusion of Law:

(1) Defendant has not sufficiently identified the error he complains of.

(2) To the extent this claim is based on issues raised on direct appeal, it is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(I) Defendant's ninth claim is that trial counsel performed inadequately at voir dire. As to this claim, the Court makes the following Findings of Fact:

(1) The voir dire appears in volumes II, III, and IV of the transcript.

(2) Defendant has failed to identify specific instances of inadequate performance.

The Court makes the following Conclusion of Law:

(1) Trial counsel performed effectively at voir dire. *State v. Bradley*, 42 Ohio St.2d 136 (1989).

(2) Voir dire is a subjective matter, and defendant has failed to present evidentiary documents or any citations to the record sufficient to demonstrate ineffective assistance of counsel. *State v. Williams* 74 Ohio App.3d 686 (1991).

(J) Defendants tenth claim is that trial counsel failed to correct egregious errors in the trial court's sentencing opinion. As to this claim, the Court makes the following Finding of Fact:

(1) Defendant has not specified any particular error.

(2) The validity of the sentencing opinion was challenged on appeal and was upheld.

The Court makes the following Conclusions of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(2) Independent review by the appellate courts would cure this alleged error. *State v. Lott*, 51 Ohio St.3d 160 (1990).

(K) Defendant's eleventh claim is that trial counsel jailed to request expert assistance to conduct forensic testing of physical evidence. As to this claim, the Court makes the following Findings of Fact:

(1) Defendant has provided no evidentiary material to demonstrate that he was prejudiced by the failure to conduct such tests.

The Court makes the following Conclusions of Law:

(1) This claim is not supported by sufficient evidentiary documents. *State v. Williams*, 74 Ohio App.3d 686 (1991).

(L) Defendant's twelfth claim is that trial counsel failed to request expert assistance to challenge the state's procedures in collecting physical evidence. As to this claim, the Court makes the following Findings of Fact:

(1) Defendant makes no showing of how he was prejudiced in this regard. *State v. Bradley*, 42

Ohio St.3d 136 (1989).

The Court makes the following Conclusion of Law:

(1) This claim is not supported by sufficient evidentiary documents and is, therefore, rejected. *State v. Williams*, 74 Ohio App.3d 686 (1991).

V. The defendant's fifth claim for relief that it is cruel and unusual punishment to execute a retarded person. As to this claim, the Court makes the following Findings of Fact:

(1) The defendant is shown by the record to be mildly mentally retarded with an IQ of about 69.

The Court makes the following Conclusion of Law:

(1) As a matter of law, a mildly mentally retarded defendant may be Punished by execution. *State v. Holloway*, 38 Ohio St.3d 239 (1988).

VI. Defendant's sixth claim for relief is that his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) were violated. As to this claim, the Court makes the following Finding of Fact:

(1) This claim was raised at trial and on appeal.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

VII. Defendant's seventh claim for relief is an allegation that he was improperly arrested in Kentucky, on an Indiana warrant, and then

questioned on the Ohio charges. Defendant argues that arrest on an Indiana warrant precludes questioning on the Ohio charges. The Court makes the following Conclusion of Law:

(1) Assuming defendant's factual assertion that he was arrested on an Indiana charge is correct, there is nothing that prevents him from then being questioned on Ohio charges. *Michigan v. Mosely*, 423 U.S. 96, 96 S.Ct. 321 (1975); *Dayton v. Erickson*, 76 Ohio St.3d 3 (1996).

VIII. Defendant's eighth claim for relief alleges a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) regarding the victim impact statement. As to this claim, the Court makes the following Findings of Fact:

(1) Neither the police nor the prosecution saw or had the victim impact statement.

(2) The victim impact statement is not favorable to defendant in the *Brady* sense.

The Court makes the following Conclusion of Law:

(1) Material compiled by a probation department in a victim impact statement is not the type of material contemplated by the rule of *Brady v. Maryland*, 373 U.S. 83 (1963).

IX. Defendant's ninth claim for relief challenges the penalty phase instruction on reasonable doubt. As to this claim, the Court makes the following Finding of Fact:

(1) This claim was raised on appeal to the Ohio Supreme Court.

The Court makes the following Conclusions of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(2) The charge given was a correct statement of law. *State v. Spirko*, 59 Ohio St.3d 1 (1991).

X. Defendant's tenth claim for relief is that the Ohio death penalty statutes are unconstitutional because they require a death sentence if aggravating factors outweigh mitigating factors. The Court makes the following Finding of Fact:

(1) This claim was raised on appeal to the Ohio Supreme Court.

The Court makes the following Conclusions of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(2) The Ohio statutes are constitutional in this regard. *State v. Van Hook*, 39 Ohio St.3d 265 (1988).

XI. Defendant's eleventh claim for relief challenges the definition of reasonable doubt used at mitigation. The Court makes the following Finding of Fact:

(1) This claim was raised on appeal to the Ohio Supreme Court.

The Court makes the following Conclusions of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(2) The charge given was legally correct. *State*

v. Spirko, 39 Ohio St.3d 1 (1991).

XII. Defendant's twelfth claim for relief is an allegation that the mitigation phase charge failed to property define the term "outweigh". The Court makes the following Finding of Fact:

(1) This claim could have been raised at trial or on appeal.

The Court makes the following Conclusion of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

XII. Defendant's thirteenth claim for relief is that the trial court erroneously charged the jury that a life sentence must be unanimous. The Court makes the following Finding of Fact:

(1) At T.p. 1201, the Court charged the jury that all 12 members must agree on a verdict.

The Court makes the following Conclusion of Law:

(1) The charge given was a correct statement of law. *State v. Davis*, 62 Ohio St.3d 326 (1991).

XIV. Defendant's fourteenth claim for relief challenges the 'no mercy or sympathy" charge at mitigation. The Court makes the following Finding of Fact:

(1) The Court charged the jury regarding mercy and sympathy.

The Court makes the following Conclusion of Law:

(1) The charge given was a correct statement of law. *State v. Clayton*, 61 Ohio St.3d 234 (1991).

XV. Defendant's final contention is that death by electrocution is unconstitutional. The Court makes the following Finding of Fact:

(1) This claim could have been raised at trial or on appeal.

The Court makes the following Conclusions of Law:

(1) This claim is barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175 (1967).

(2) Death by electrocution is constitutional. *State v. Jenkins*, 15 Ohio St.3d 1964 (1984).

Based on the above Findings of Fact and Conclusions of Law, the court hereby dismisses the defendant's Petition to Vacate.

/s/ Robert S. Kraft
Judge, Court of Common Pleas

COUNSEL:

William E. Breyer (0002138)
Asst. Prosecuting Attorney
230 E. Ninth Street, Suite 7000
Cincinnati, Ohio 45202

COUNSEL FOR PLAINTIFF, STATE OF OHIO

S. Scott Haynes, Esq.
1616 Brice Road
Reynoldsbury, OH 43068

and

J. Joseph Bodine
Asst. State Public Defender
8 East Long Street - 11th Floor
Columbus, OH 43215-2998

COUNSEL FOR DEFENDANT, MICHAEL BIES

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. C-980688
(Filed February 9, 1999)

STATE OF OHIO
Plaintiff-Appellee

v.

MICHAEL BIES
Defendant-Appellant

EXCERPTS OF
STATE'S MERIT BRIEF

Michael K. Allen (#0025214P)
Prosecuting Attorney
William E. Breyer (#002138P)
Assistant Prosecuting Attorney
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3006
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE

S. Scott Haynes (0059586)
Hallowes, Bies & Haynes
1616 Brice Road
Reynoldsburg, Ohio 43068
(614) 868-0009

J. Joseph Bodine, Jr. (0042132)
Asst. State Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215-2998

(614) 466-5394

COUNSEL FOR DEFENDANT-APPELLANT

* * *

(E) Defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. The record reveals defendant to be mildly mentally retarded with an I.Q. of about 69. As a matter of law, such a person may be punished by execution. *State v. Holloway*, 38 Ohio St.3d 239, 527 N.E.2d 831 (1988).

(F) Defendant's sixth claim for relief is that the "Hamilton County Police Department" violated his Miranda rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). This claim was raised at trial and on appeal, and is therefore barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

(G) Defendant's seventh claim for relief is an allegation that he was improperly arrested in Kentucky, on an Indiana warrant, and thereafter questioned on an Ohio charge. Defendant provides no evidentiary documents to show that there was no Indiana warrant. Instead, he argues that the arrest on the Indiana warrant prevents questioning concerning other crimes. This is an incorrect statement of law. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975); *Dayton v. Erickson*, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1966), and this claim for relief must be rejected.

(H) Defendant's eighth claim for relief is an allegation of a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83 (1963). In this claim, defendant raises

the same issue that he raised in his first claim for relief, i.e., the victim impact statement. First of all, there could be no *Brady* violation because the prosecution and police never saw or had the victim statement, and it was not favorable. Also, for the reasons stated in the State's response to the first claim for relief, the statement had no impact on the sentencing.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-980688
Trial No. B-925607
(Entered June 30, 1999)

STATE OF OHIO,
Plaintiff-Appellee,
vs.
MICHAEL BIES,
Defendant-Appellant.

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From is: Affirmed

Date of Judgment Entry on Appeal: June 30, 1999

Hallowes, Bies & Haynes, and S. Scott Haynes, and J. Joseph Bodine, Jr., Assistant State Public Defender, for Defendant-Appellant,

Michael K. Allen, Prosecuting Attorney, and William E. Breyer, Assistant Prosecuting Attorney, for Plaintiff-Appellee.

Per Curiam.

Petitioner Michael Bies appeals from the trial court's order dismissing his petition for postconviction relief brought pursuant to R.C. 2953.21. The trial court held that an evidentiary

hearing was not necessary to determine the issues that Bies raised in his petition and, concurrent with its entry dismissing the petition, journalized its findings of fact and conclusions of law. Bies asserts four assignments of error. Because we find no merit in any of the assignments of error, we affirm.

Assignment of Error No. 1

In his first assignment of error, Bies argues initially that the trial court erred by adopting nearly verbatim the findings of fact and conclusions of law proposed by the prosecutor. This court has previously rejected such claims absent any evidence of prejudice. See *State v. Combs* (1994), 100 Ohio App.3d 90, 110, 652 N.E.2d 205, 218 (citing other cases).

Bies also argues that "[t]here is no record of the capital trial in this Court," which is simply incorrect because the record has been certified to us.

Bies further asserts that his attorney was denied any access to the record while it was in the clerk's office. We note that the state has submitted that the record was present and freely accessible. The affidavit proffered by Bies in support of this claim establishes only that a paralegal with the Ohio Public Defender's Commission was advised by the exhibit clerk that documents or photographs were contained in the exhibit room. According to the affidavit, the exhibit clerk further advised the paralegal that the exhibit room did not have a photocopier, and that a court order was required to remove the materials. Later, upon mutual agreement, the paralegal returned with a portable photocopier. According to the paralegal in her

affidavit, "[U]pon examining the evidence I was made aware that the documents and/or photographs compiled within the exhibit boxes were expansive and beyond the capabilities of the portable photocopier." The exhibit clerk then once again advised the paralegal that she should obtain a court order to remove the documents in order to properly photocopy them. According to Bies, the paralegal's affidavit shows that parts of the record were "shielded from public scrutiny" and that his attorneys were denied access. Needless to say, we are not persuaded.

Although Bies argues that the trial court did not have the entire record to review, there is no proof offered to support this statement. Apparently the only basis for this assertion is Bies's dubious claim that he was denied access to the record, from which he infers that the court did not have the record for review. We find this allegation to be wholly speculative and false in its premise. The first assignment of error is overruled.

Assignment of Error No.2

In his second assignment of error, Bies asserts that the postconviction process in Ohio is, in his words, "a sham procedure." We recently rejected a similar argument in *State v. Fautenberry* (Dec. 31, 1998), Hamilton App. No. C-971017, unreported.

Bies also argues that the trial court erred by denying his discovery. We have repeatedly ruled that Ohio's postconviction statutes do no contemplate discovery in the initial stages of the proceedings. *Id.*; see, also, *State v. Campbell* (Jan. 8, 1997), Hamilton App. No. C-950746, unreported; *State v. Zuern* (Dec.

4, 1991), Hamilton App. Nos. C-900481 and C-910229, unreported; and *State v. Buerger* (Dec. 20, 1989), Hamilton App. No. C-880664, unreported.

Assignment of Error No. 3

In his third assignment of error, Bies argues that the trial court erred by not applying the standards of Civ.R. 12(B) and Civ.R. 56 in dismissing his petition in response to the state's memorandum in response to the petition. This assignment is overruled upon the authority of *State v. Moore* (Sept. 18, 1998), Hamilton App. No. C-970353, unreported.

Assignment of Error No.4

In his fourth assignment of error, Bies asserts that the trial court erred by dismissing his various causes of action without an evidentiary hearing or discovery. This assertion requires that we address each of his causes of action in turn.

1. First Cause of Action

In his first cause of action, Bies asserts that the trial court erred by considering a victim's request for the death penalty contained in a victim-impact statement "which was found in the court's files but which was never formally made part of the file."

As the state remonstrates, no reference is made in the trial court's written sentencing opinion to the victim-impact statement to which Bies refers. The record therefore does not support the contention that the statement entered into the trial court's process of determining whether, as a basis for imposing the death penalty, the aggravating circumstances outweighed the mitigating factors

beyond a reasonable doubt. Further, any error in the consideration of this document would have been corrected by the *de novo* review of the sentence by this court and the Ohio Supreme Court. *Clemons v. Mississippi* (1990), 494 U.S. 738, 110 S.Ct. 1441; *State v. Lott* (1990), 51 Ohio St.3d 160, 170, 555 N.E.2d 293, 304; R.C. 2929.05.

2. Second Cause of Action

In his second cause of action, Bies argues that he was denied effective assistance of counsel because of his trial attorney's alleged failure to develop and present additional mitigation evidence concerning his "mental illness." In support of this assertion, Bies has presented the affidavit of a criminal defense attorney experienced in capital murder cases, the affidavit of a psychologist who has recently evaluated him, and additional affidavits and medical records. The records document Bies's treatment for psychological disorders and a host of childhood medical problems, including "pneumonia, respiratory infections, a severe case of measles, and ear infections (including one which resulted in a punctured eardrum)." Finally, Bies submitted affidavits from potential mitigation witnesses not called at trial, including a statement from his father admitting that he was abusive.

Because Bies's claims of ineffective assistance of counsel are supported by evidence dehors the record, they are not barred by the doctrine of *res judicata*. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, syllabus. We note, however, that the affidavit of the criminal defense attorney reviewing the case does not constitute legitimate new evidence

because, as we have previously held, such an affidavit is essentially a notarized argument that could and should have raised on direct appeal. *State v. Zuern*, *supra*; see, also, *State v. Steffen* (May 11, 1994), Hamilton App. No. C-930351, unreported.

As for the claims legitimately supported by additional evidence, Bies must show that his trial counsel violated a substantial duty by failing to secure the evidence to present at trial, and that such failure resulted in prejudice. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 1258; *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *State v. Powell* (1993), 90 Ohio App.3d 260, 629 N.E.2d 13. As this court has previously noted, a reviewing court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052, 2065.

Although the criminal defense bar frequently criticizes the performance of trial counsel for anything less than the best available practice in the defense field, the Ohio Supreme Court has expressly rejected this as the measuring rod to determine whether counsel is effective. *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623, 627; see, also, *State v. Post* (1987), 32 Ohio St.3d 380, 513 N.E.2d 754. Although certainly it is the goal to be striven for, the constitution does not guarantee a perfect trial, or even the best available defense. *Zuern*, *supra*. As the Ohio Supreme Court has observed, "There are many attorneys who fail to use the best

available practices, yet relatively few who are found to be incompetent." *Lytle* at 396, 358 N.E.2d 627.

Applying these standards to the evidence Bies has submitted, we note that we are hard-pressed to attach much mitigative value to the fact that Bies suffered from a severe case of measles as a child, or a series of ear infections, one of which led to a punctured eardrum. Certainly there is no rule that defense counsel is ineffective for failing to present a defendant's entire medical history in mitigation. Competent trial counsel may well make a strategic decision not to inundate the jury with inconsequential medical information that may trivialize the defense rather than render it more effective.

As for the medical records documenting Bies's depression, suicidal tendencies, hyperactivity, and "schizotypal personality disorder," we note that, during the mitigation phase of the trial, there was a substantial amount of evidence presented concerning Bies's psychological makeup. Specifically, trial counsel presented the testimony of Dr. Donna Winter, a clinical psychologist who had interviewed Bies three times and subjected him to Weschler Adult Intelligence Scale and Bender-Gestalt tests. The former is a scale of intelligence and the latter a screening test for organic brain disease. Additionally, Dr. Winter obtained records of Bies's earlier psychiatric and psychological examinations.

Dr. Winter testified extensively about the abusive nature of Bies's early childhood; his problems with early childhood development; the evidence of neglect; his hospitalizations for

dehydration, pneumonia, and encephalitis; his youthful suicide attempts and attempts at self-mutilation; his inability to function normally at school due to disruptive, violent behavior; his placement in a school for children with severe behavioral handicaps, as well as his number of diagnoses for attention deficit/hyperactivity disorder, adjustment disorder with depression, adjustment disorder with mixed disturbance of emotions and conduct, development disorder, and possible bipolarism. She discussed also his history of hearing voices and the potential for schizophrenic disorder. As for organic brain disorder, she testified that this had been mentioned in Bies's history and that his developmental academic disorder was always associated with minimal brain dysfunction. She testified further that Bies had an IQ score of 69, which, put him within the range of mild to moderate mental retardation, or in the bottom seven percent of the population with respect to intelligence. She assessed his IQ as no more than that of a third- or sixth-grader.

As for Bies's childhood abuse, Dr. Winter made clear that the evidence supported the conclusion that he was beaten, not spanked. She described him as "very abused" in childhood and gave her opinion that his youthful violent behavior was all learned behavior. She testified that Bies's "chaotic upbringing" was marked by his mother "moving one man in and out of the house," and that his mother had a penchant for "abusive men that beat her." According to Dr. Winter, Bies's mother was "a lady who set no limits." As a result, she testified, Bies often imposed injury upon himself, one

time putting alcohol on his skin and setting himself on fire. According to Dr. Winter, Bies does not have "a normal pain threshold."

Dr. Winter concluded that, in addition to low intellectual functioning, Bies has a personality disorder that makes him prone to imitate violence. She stated further that he has "some nonspecific brain damage" that exhibits itself in learning disabilities. She stated that it was "hard to say" whether he possesses a conscience. She described him as "[h]ighly, extremely impulsive, always," which she explained to mean that he does not think about what he is doing, the consequences, or the ramifications. She stated, "He's basically impulse-ridden. Everything about his life, you could call it a whim. Something comes in his head and he does it; he doesn't much think about it." Dr. Winter testified that Bies had been on medication throughout his childhood—Ritalin for hyperactivity, and "major tranquilizers." These medications, she testified, were "meant to control him, keep him under control."

In sum, the jury was given abundant sympathetic information about Bies's psychological makeup and his upbringing. The voluminous medical records that Bies has included in his postconviction petition were summarized effectively by Dr. Winter. The fact that defense counsel did not present live witnesses to support the social history contained in the records does not render his performance ineffective, since the social history was uncontradicted. Live witnesses may well have detracted from rather than strengthened the mitigating nature of the social history that the jury

was given through the presentation of Dr. Winter. As we held in *Combs*, *supra*, if it is merely cumulative of, or alternative to, material presented at trial, the trial court may deny without a hearing a claim of ineffective assistance of counsel based on defense counsel's failure to present evidence at trial. *Combs*, *supra* at 98, 652 N.E.2d at 210.

As for the new psychological evaluation by Dr. Haskins, we note that her conclusions are almost identical to those of Dr. Winter. Specifically, Dr. Haskins found that Bies's childhood was marked by "chaos, neglect, abuse and parental inconsistency and rejection," resulting in "abnormal personality characteristics"; that his intellectual functioning is in the "borderline to mild mental retardation range"; that, as a result of his childhood abuse and neglect, he presented symptoms of anxiety, aggressive behavior, paranoid thinking, post-traumatic stress disorder, depression, and an increased risk of suicide; and that the evidence strongly suggested the presence of central nervous system dysfunction that may affect his cognitive reasoning ability, including nonverbal reasoning functions and his ability to interpret complex events.

As for the possibility of organic brain damage, Dr. Haskins stated that further neuropsychological testing was necessary for an accurate evaluation. She stated that such testing was available at the time of Bies's pretrial evaluations and should have been administered "in order to present to the jury a comprehensive and accurate assessment of Mr. Bies's ability to comprehend the wrongfulness of his behaviors and his capacity to control his conduct at

the time of the offenses in question."

Because of her almost identical findings, Dr. Haskins's psychological evaluation of Bies is largely cumulative to the evidence presented by Dr. Winter at trial. In the absence of the type of neurological testing she proposed, it is impossible to know what such testing might demonstrate, and therefore it is purely speculative to conclude that such testing would have produced results that would have swayed the jury to spare Bies's life. We note also that Dr. Winter told the jury that organic brain dysfunction was associated with the type of learning disabilities demonstrated by Bies, and it is clear from her testimony that she assumed that some degree of brain damage was present. Because the jury knew that Bies was abused, neglected, borderline retarded, developmentally disabled, brain-damaged to some unknown degree, and unable to control his impulses due to a personality disorder, it is hard to imagine what more the jury could have been told that might have changed its mind. Obviously the jury and trial court concluded, as did this court and the Ohio Supreme Court, that the aggravating circumstances of the particularly horrific crime that Bies committed—the kidnapping, attempted rape and murder of a ten-year-old boy, Aaron Raines—outweighed beyond a reasonable doubt the unfortunate circumstances of Bies's own life. As stated by the Ohio Supreme Court in its *de novo* review of the sentencing evidence:

> Upon independent weighing, the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The totality of the

> evidence and circumstances portray a heinous and brutal crime that shocks the senses. A small ten-year-old boy who was afraid of the dark and who had problems walking was tricked into going into two abandoned buildings to earn some money. Once inside, Bies and Gumm made Aaron aware of their sexual intentions and Aaron resisted. But he was not allowed to leave. This clearly constituted kidnapping under R.C. 2905.01. Aaron was then dragged over to another building against his will where the attempted rape took place. After Aaron refused to accede to the sexual desires of his abductors, he was brutally murdered. Bies's participation in these crimes merits the capital penalty to which he was sentenced.

Bies, supra, at 328, 658 N.E.2d at 762.

3. Third Cause of Action

In his third cause of action, Bies claims again that his trial counsel was ineffective by (1) failing to collect records of his mental illness, (2) failing to present to the jury significant information concerning his mental retardation, (3) soliciting "seriously misleading testimony from the court psychologist about mental retardation," (4) failing to request neurological testing, and (5) failing to conduct interviews with Bies's immediate family.

Bies's third cause of action is very similar to his second. We incorporate, therefore, our previous analysis here with respect to the records, the decision not to call additional witnesses, and the presentation of Dr. Winter. We also simply disagree

that trial counsel failed to "present to the jury any significant evidence about mental retardation," or that counsel elicited "seriously misleading testimony about mental retardation." Bies does not submit any evidence to support the latter assertion, nor can we find anything in the transcript that appears even slightly misleading or prejudicial to the case in favor of mitigation. Again, the jury was told by Dr. Winter that Bies likely suffers from organic brain damage, that he is borderline mentally retarded, and that he was subject to fits of rage as a child. We find no basis in any of part of this to conclude that Bies's counsel was constitutionally ineffective.

4. Fourth Cause of Action

In his fourth cause of action, Bies claims that his trial counsel was ineffective in the following respects: (1) failing to challenge his confession based upon the fact that he is mentally retarded; (2) failing to challenge jurors for cause; (3) failing to object to jury instructions; (4) conducting an inadequate *voir dire*; (5) failing to correct alleged errors in the sentencing opinion; (6) failing to request expert assistance to conduct forensic testing of physical evidence; and (7) failing to request expert assistance to challenge the state's procedures in collecting physical evidence. All these claims could and should have been raised on direct appeal, however, and are therefore bared under the syllabus of *State v. Cole*, *supra*:

> Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without

> evidence dehors the record, res judicata is a proper basis for dismissing defendant's position for postconviction relief. (State v. Hester, 45 Ohio St.2d 71, [74 O.O.2d 156], modified.)[1]

In this regard, we note that Bies was represented on appeal by both trial counsel (or, more precisely, one of two attorneys who represented him at trial) and new counsel. We have previously held that where trial counsel is joined by new co-counsel on appeal, the syllabus of *Perry* applies, since it is presumed that the new attorney added for purposes of appeal will not be restrained from advancing any errors he or she perceives in trial counsel's performance. See *Zuern, supra.* Although in this case new appellate counsel practiced law with trial counsel, we still adhere to the presumption that new counsel followed his or her professional duty and exercised independent judgment while zealously advocating the interests of the client, even if that duty meant impugning the trial performance of appellate co-counsel.

5. Fifth Cause of Action

In his fifth cause of action, Bies claims that the imposition of the death penalty on a person who is mentally retarded constitutes cruel and unusual punishment. He argues that "[m]entally retarded defendants are comparable to the common law 'idiot'

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[1] We note that the claim that trial counsel was ineffective for failing to challenge the confession based upon Bies's mental retardation was, in fact, raised on direct appeal and rejected by the Ohio Supreme Court in *State v. Hies* (1996), 74 Ohio St.3d 320, 658 N.E.2d 104.

who was not morally responsible for his crimes." As this is a claim that could and should have been raised on direct appeal, it is barred under the ninth paragraph of the syllabus of *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104:

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

We note further that the Ohio Supreme Court has rejected the argument on its merits in *State v. Holloway* (1988), 38 Ohio St.3d 239, 527 N.E.2d 831.

6. Sixth Cause of Action

In his sixth cause of action, Bies claims that the "Hamilton County Police Department" violated his rights by establishing "standards of practice regarding interrogations" that are constitutionally infirm by allowing for the questioning of mentally retarded persons without the benefit of counsel. As this is a claim that could and should have been raised on direct appeal, it, too, is bared under the syllabus of *Perry, supra.*

7. Seventh Cause of Action

In his seventh cause of action, Bies asserts that his confession should have been suppressed because "Cincinnati Police officers used an Indiana

warrant to compel Kentucky law enforcement officials to arrest [Bies] in order to interrogate him for an Ohio crime." Again, this is a claim that does not depend upon evidence outside of the record and therefore could and should have been raised on direct appeal. The claim is, therefore, barred under the doctrine of *Perry, supra.*

8. Eighth Cause of Action

In his eighth cause of action, Bies claims that his sentences are void or voidable because the state withheld exculpatory evidence, to-wit, the victim-impact statement referred to previously. This claim is barred under *Perry, supra.*

9. Ninth Cause of Action

In his ninth cause of action, Bies claims that his sentences are void or voidable because of the definition of the phrase "beyond a reasonable doubt" as it appeared in the penalty phase instructions. This claim is barred under *Perry, supra,* since it in no way depends on evidence dehors the record.

10. Tenth and Twelfth Causes

In his tenth cause of action, Bies argues that his sentences are void or voidable because the Ohio death-penalty statutes result in the "arbitrary and capricious killing of citizens," because the terms "aggravating" and "mitigating" are not statutorily defined. In his twelfth cause of action, Bies similarly attacks the trial court's alleged failure to adequately define the term "outweigh" in its sentencing instructions. According to Bies, the jurors were required to decide whether the aggravating circumstances outweighed the mitigating factors

beyond a reasonable doubt without any guidance as to what the terms "aggravating," "outweigh," and "mitigating" meant. Further, Bies charges that the prosecutor contributed to this confusion in the weighing process by his statements to the jury.

In support of this argument, Bies has submitted the affidavit of a professor of linguistics as well as a copy of an article entitled "Dictionaries and Death: Do Capital Jurors Understand Mitigation?[2] The statements of the prosecutor have, of course, been in the record since they were spoken.

Having read the materials that Bies has submitted, we are convinced that his claim is a challenge to the death-penalty statutes as being void for vagueness. As the Ohio Supreme Court has noted, the postconviction process is not intended as a forum to litigate constitutional issues that could have been raised at trial or on direct appeal, thus relegating courts to "disposing of the action on technicalities or collateral issues, as opposed to the merits." *State v. Roberts* (1982), 1 Ohio St.3d 36, 39, 437 N.E.2d 598, 601. In effect, Bies is asking us, after his conviction has been affirmed on direct appeal, to consider a constitutional argument that could have been, but was not, raised during the trial or the entire process of direct appeal.

Notwithstanding this abuse of the postconviction process, and assuming that his materials constitute some form of new evidence—

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[2] The article appears in the appendix of the postconviction petition without a citation. It was written by Peter Meijes Tiersema of the Loyola Law School.

although they appear more in the nature of source material for arguments that should have been made earlier—we simply disagree that the statute is infirm in the sense that Bies claims. We do not find the words "aggravating," "mitigating" or "outweigh" to be beyond the ken of the average juror, or the process of relating each term to the other to be the linguistic swamp that the academician perceives it to be. The aggravating circumstances are exclusively defined by statute. Possible mitigating factors are enumerated. The jury is asked to determine if the former outweighs the latter beyond a reasonable doubt in order to recommend a death sentence. On its face, there is nothing confusing about this process.

Furthermore, we note that, as pointed out by the article Bies submits, several state and federal courts have expressly held that the statutory terms "mitigating circumstance" and "aggravating factor" need not be further defined for the jury. See, e.g., *Cape v. State* (1980), 246 Ga. 520, 272 S.E.2d 487; *Pruett v. State* (1985), 287 Ark. 124, 697 S.W.2d 872, 876; *Lee Vasseur v. Commonwealth* (1983), 225 Va. 564, 304 S.E.2d 644; *DeLong v. Thompson* (E.D. Va. 1991), 790 F.Supp. 594, 610; *People v. Dyer* (1988), 49 Cal.3d 991, 264 Cal.Rptr. 386, 782 P.2d 627. Interestingly, the only appellate court quoted in the article submitted by Bies that did decide to require the trial court to provide the jury with a definition of "mitigating," later reversed course and held that the only requirement is that it be evident from the facts and proceedings that the jury was aware of the nature of mitigation. Compare *Dix v. Kemp* (C.A.11, 1985), 763 F.2d 1207, and *Westbrook v. Zant* (C.A.11 1983), 704 F.2d 1487, with *Peek v. Kemp* (C.A.11,

1986), 784 F.2d 1479, 1494.

Finally, we note that the weighing process was conducted de novo by the trial court, this court, and the Ohio Supreme Court, thus correcting any error that may have resulted from any possible confusion among the jurors. *Clemons*, *supra*; *Lott*, *supra*.

As for the statements of the prosecutor, the subject of their propriety is bared under *Perry*, *supra*, since this is an issue that could and should have been raised on direct appeal.

11. Eleventh Cause of Action

In his eleventh cause of action, Bies claims that the definition of "reasonable doubt" given to jury by the trial court in its mitigation charge "unconstitutionally shifted the burden of proof on the issue of punishment and prevented the jury from making its constitutionally required finding of the appropriateness of the death penalty." This is another claim that, not being dependent upon any evidence outside the record, could and should have been raised on direct appeal and is therefore barred under *Perry*, *supra*.

12. Thirteenth Cause of Action

In his thirteenth cause of action, Bies argues that his convictions are void or voidable because "the trial court instructed the jury in the mitigation phase that a life verdict must be unanimous." This, obviously, is an issue that could and should have been raised on direct appeal. The claim is, therefore, barred under *Perry*, *supra*. We note also that the Ohio Supreme Court has held that a sentence of life imprisonment under R.C. 2929.03(D)(2) must be

unanimous. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 184, 473 N.E.2d 264, paragraph ten of the syllabus. The instruction was, therefore, correct.

13. Fourteenth Cause of Action

In his fourteenth cause of action, Bies claims that his sentences are void or voidable because the jury was instructed that it could not be influenced in its deliberations by any consideration of sympathy or mercy. This claim is barred under *Perry, supra*. The same claim has, moreover, been rejected by the Ohio Supreme Court in *State v. Clayton* (1991), 61 Ohio St.3d 234, 574 N.E.2d 472.

14. Fifteenth Cause of Action

In his fifteenth cause of action, Bies asserts that his conviction "and/or" sentences are void or voidable because "death by electrocution constitutes a blatant disregard for the value of human life, entails unnecessary and wanton infliction of pain and diminishes the dignity of man." As the state points out, however, "there really is no issue here" because Ohio also provides for death by lethal injection. Thus, whatever the horrific nature of the electric chair, Bies has the option of choosing death by another means. As for the argument that death by electrocution diminishes the dignity of man, we need only note that there appears no more ignominious and undeserved manner of death than that suffered by Aaron Raines.

Bies's fourth and final assignment is overruled.

Accordingly, the judgment below is affirmed.

Judgment affirmed

DOAN, P.J., GORMAN AND WINKLER, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE SUPREME COURT OF OHIO

No. 99-1525
(Filed September 15, 1999)

STATE OF OHIO
Plaintiff-Appellee

v.

MICHAEL BIES
Defendant-Appellant

EXCERPTS OF STATE'S
MEMORANDUM IN RESPONSE

Michael K. Allen (0025214P)
Prosecuting Attorney
William E. Breyer (002138P)
Assistant Prosecuting Attorney
Counsel of Record
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3006
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

David H. Bodiker (0016590)
State Public Defender
J. Joseph Bodine, Jr. (0042132)
Assistant State Public Defender
Counsel of Record
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax (614) 728-3670

* * *

Supreme Court would cure any error. *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990).

(k) Defendant next contends trial counsel failed to request expert assistance to conduct forensic testing of physical evidence. Defendant does not meet his burden of showing how the failure to request such testing was prejudicial, thus this claim must fail. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (1991).

(l) Defendant's final claim here is that trial counsel failed to request expert assistance to challenge the state's procedures in collecting physical evidence. Defendant presents no explanation as to why this was necessary, or how the failure to do so prejudiced him. *State v. Williams*, 74 Ohio App.3d 686, 600 N.E.2d 298 (1991). Absent such a preliminary showing, this claim must be rejected. *State v. Bradley*, 42 Ohio St.2d 136, 538 N.E.2d 373 (1989).

(E) Defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. The record reveals defendant to be mildly mentally retarded with an I.Q. of about 69. As a matter of law, such a person may be punished by execution. *State v. Holloway*, 38 Ohio St.3d 239, 527 N.E.2d 831 (1988).

(F) Defendant's sixth claim for relief is that

the "Hamilton County Police Department" violated his Miranda rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). This claim was raised at trial and on appeal, and is therefore barred by res judicata. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).

BEHAVIORAL SCIENCE CENTER, INC.
Mental Health Consultants
2522 Highland Avenue.
Cincinnati, Ohio 45219
Phone (513) 221-8545
Fax (513) 861-BSCI

September 11, 1992

The Hon. J. Howard Sunderman
Hamilton County Court of Common Pleas
Hamilton County Courthouse
1000 Main Street
Cincinnati, OH 45202

Re: Michael Bies
Docket No. B925607

Your Honor:

Michael Bies was evaluated at the Hamilton County Justice Center on September 11, 1992 in reference to his "not guilty by reason of insanity" plea to the charge of Aggravated Murder. In addition to interviewing Mr. Bies, collateral information supplied by the Court Psychiatric Center was reviewed. This information included a report of a phone contact with the prosecuting attorney, an intake diagnostic assessment, a witness list, a summary of investigation prepared by the Cincinnati Police Division, two transcripts of statements made by Mr. Bies, records from the H.C.J.C. Mental Health Unit, and reports of collateral telephone contacts with Mr. Bies' mother and common-law

wife. Also, results of intelligence testing with the Wechsler Adult Intelligence Scale were supplied by Dr. Donna Winter.

Mr. Bies presented as a rather clean cut twenty year old white male who appeared his chronological age. He was alert, fully oriented, and cooperative. His affect was somewhat blunted, but not inappropriate. He complained of depression, but did not appear significantly depressed. He was quite spontaneous during the interview, often volunteering information without specific questioning. His thought content and cognitive associations were appropriate. His memory appeared to be unimpaired, but was somewhat selective. He reported a long history of auditory hallucinations in which voices tell him to kill himself, but was not actively hallucinating during the interview. He denied ever having these voices tell him to hurt or kill anyone other than himself. His thought process was generally unimpaired, but was at times somewhat illogical. For example, he seemed to conclude that he should not be held responsible for his behavior relative to the Aggravated Murder charge because he has a history of being suicidal. Mr. Bies did not display any symptoms of a major affective disorder or thought disorder.

During the interview, Mr. Bies tended to focus on his sister's recent death, stating the he did not care what happened to him because of the shock of her death. He said they were very close, expressed frustration that he could not get more information about her death, and said he was close to "breaking" due to her death. He reported having made two suicide

attempts while in H.C.J.C. as a result of his sister's death. He appeared to have some selective memory loss due to her death. For example, he did not recall many of the specifics of the events around the boy's death, nor did he remember what he said in his statements to the police, reportedly due to the shock of his sister's death.

Mr. Bies' recollection of the boy's death was essentially the same story as reported in the bottom paragraph of page two of the Psychiatric Social Work Intake Diagnostic Assessment done by Shirley Leahy of the Court Psychiatric Clinic. He admitted to being the building, but did not admit to having harmed the victim in any way. He said that the other defendant apparently tried to molest, slapped, and eventually killed the boy while Mr. Bies was in another room. Regarding his mental state on the day of the boy's death, Mr. Bies said that he was not having a bad day and did not think he was hearing any voices. Even if he was experiencing auditory hallucinations, he denied ever having command hallucinations that told him to kill anyone. He further stated, "I never hurt no one in my life." He reported that, due to the shock of his sister's death, he did not remember his motivation for being in the vacant building with the other defendant and the victim, but it was not sexual.

Mr. Bies' history is reported in the Psychiatric Social Work Intake Diagnostic Assessment. Mr. Bies clearly comes from a dysfunctional family background. His abusive alcoholic father left the family when Mr. Bies was very young and his mother reportedly had a constant procession of men in the

home. There is no report that Mr. Bies was ever physically or sexually abused. Both he and his mother reported that he has been suicidal since age five. However, the lack of scars suggests that some of these reports may be exaggerated. Mr. Bies has had several psychiatric hospitalizations related to his suicidality. He denies any history of drug or alcohol abuse, although his mother reports that he drank enough to make her concerned that he could become an alcoholic. There was no history reported of hurting animals or setting fires. His mother described him as a "super jealous" child who had difficulty separating from her. She reported that he has been on SSI for several years for "mild retardation". This is consistent with the I.Q. of 68 as found by Dr. Winters. Mr. Bies was in special education classes and did not complete high school. Mr. Bies has an outstanding warrant in Indiana for Receiving Stolen Property. I am not aware of any other history of legal charges.

Michael Bies is a marginally functioning, mildly mentally retarded man from a dysfunctional family background who has never fully achieved satisfactory life adjustment. I do not believe he has a major thought disorder and, even it he does, there was no active mental illness that contributed to his behavior relative to the Aggravated Murder Charge. His psychological problems appear to be more in the realm of personality disorder than psychosis. At the time of the offense, I do not believe he was suffering from a mental illness or defect that rendered him incapable of knowing the wrongfulness of his conduct or conforming his conduct to the requirements of the law. Therefore, I do not recommend a finding of

N.G.R.I.

Sincerely,

/s/ Myron S. Fridman, Ph.D.

Myron S. Fridman, Ph.D.
Ohio License #2760
fs

COURT REPORT

CENTRAL PSYCHIATRIC CLINIC
COURT PSYCHIATRIC CENTER
216 E. 9th Street - Fifth Floor
Cincinnati, Ohio 45202
(513) 352-3111

NAME Michael Bies DATE OF BIRTH 5-9-72

DOCKET NUMBER B92-5607

OFFENSE Aggravated Murder with Specifications

REF. DATE 8-11-92 EVAL. DATE 9-10-92

COURT DATE 9-14-92

The Honorable J. Howard Sundermann, Jr.
Hamilton County Court of Common Pleas
Cincinnati, Ohio 45202

RE: NGRI

Dear Judge Sundermann:

This is in response to your court order that Michael Bies be evaluated with reference to his mental state at the time of the alleged act with which he is charged (Aggravated Murder with Specifications), pursuant to Ohio Revised Code 2945.39 and as defined in Ohio Revised Code 2901.01(N). Michael Bies was initially interviewed by Shirley W. Leahy, ACSW, LISW, Clinical Social Worker, in the Hamilton County Criminal Justice Center (HCJC) on August 31, 1992 and on September 1, 1992. Mr. Bies was further evaluated by the undersigned in the HCJC on September 8, 1992 and again on September 10, 1992. Evaluation was accomplished by interviewe and administration of the Wechsler Adult Intelligence Scale - Revised

(WAIS-R) and the Bender-Gestalt. Prior to the evaluation process, Mr. Bies was made aware of nonconfidentiality limits. In addition, Mr. Bies was informed about the phases of his forthcoming trial. He was specifically advised that information given in the current examination may be used as a basis for a later examination regarding mitigating factors. An explanation statement to this effect was reviewed with Mr. Bies and clarified for him. Mr. Bies indicated his understanding of these factors, both verbally and by his signature. The following summary of my findings and conclusions is based upon: (l) the current evaluation of Michael Bies, together with psychological testing; (2) information received by Ms. Leahy in collateral contact with the defense attorney, Joe Dixon; the prosecuting attorney, Tom Longano; Mr. Bies' mother, Linda Bies; Mr. Bies' girlfriend, Carol Lucky; and (3) review of Mr. Bies' contacts with Mental Health services at the HCJC. Additional information with regard to Mr. Bies' developmental history has been requested, but not received at the time of the writing of this report. These records would include school information (Cook County Board of Education, Chicago; Edgetown School; Southern School; Victor Newman School), medical records (Susan Balverde, M.D., Pediatrician, Chicago), records of psychiatric treatment (Loretta Hospital, Chicago; Chicago Reed Hospital; St. Mary of Nazareth, Chicago); Michael Reese Dysfunctional Child Center, Chicago).

Description of Defendant: Michael Bies is a twenty year old, divorced man who is being held in maximum security at the HCJC, following an alleged escape attempt. Mr. Bies presents as cooperative,

but as dense, naive and in denial abut his unique legal situation. Mr. Bies has a concrete, and sometimes illogical way of thinking which is consistent with his mild mental retardation. He initially told Ms. Leahy he had not been in Cincinnati on the day of the offense, and therefore, that was his defense. When confronted with statements he had made to the police in regard to the alleged act, Mr. Bies acknowledged these but said since he couldn't remember anything he had previously told the police, it didn't hold true. Eventually, he gave a relevant, coherent and detailed account of the events which led to his arrest. Mr. Bies had a tendency to get bogged down in irrelevant details. As an example, when I reviewed with him a statement he had previously made, Mr. Bies became upset stating, "I didn't say I 'spotted' Junior (Darrell Gumm). I said I 'ran into him'." Mr. Bies had a problem understanding that whether he "spotted" Darrell Gumm or "ran into" Darrell Gumm had little impact on his defense.

Although Mr. Bies' thought processes were simplistic, there was no evidence of mental illness in the form of substantial disorders of mood, thought, orientation or perception. Mr. Bies was cheerful and pleasant. He did not appear to be clinically depressed, but he did say he has suicidal thoughts, from time to time. When first incarcerated, he scraped the top of his arms with a spoon. Mr. Bies is a man who has a long history of impulsive suicidal gestures which are not necessarily connected to any depressed state. During this incarceration, Mr. Bies has been evaluated by Psychiatric Services at the HCJC, but has not required care on the Mental

Health Unit.

Relevant History: Michael Bies was born in Wisconsin and raised in Chicago as the second of his mothers' three children. Mr. Bies and his younger sister are the product of a relationship between mother and a man by the name of Michael Alvin Johnson. Mr. Bies indicates the father of his older brother is in the penitentiary serving time for Murder. Mr. Bies was raised by his mother. His father disappeared from his life, early on. According to Mr. Bies' mother, the father left when the defendant was one year old. They reunited one year later, but then separated permanently. The mother describes the father as abusive and violent to her. He was an alcoholic who would periodically tear up the house. The defendant's mother states she remembers a time when the defendant tried to hit his father with a frying pan when the father was beating up mother.

Mr. Bies' mother describes him as a child who displayed a good deal of anger since he was about five years old. He was cursing at his mother by that age. The mother states that as Mr. Bies grew older, he was difficult to control and "you have to let him know you have the upper hand." The most violence the mother ever saw from the defendant was when he tore up a whole room, flipping dressers and furniture. Once, the defendant hit her and the police were called in that regard.

Mr. Bies apparently exhibited developmental delays from birth. He was almost a year old before he could sit up and almost two years old before he could walk. When he was two years old, he

developed encephalitis. The mother indicates that, as a young child, Mr. Bies made repeated statements about wanting to kill himself. She found him trying to cut himself with scissors. Mr. Bies was treated at a number of child psychiatric facilities (Loretta Hospital, Chicago Reed Hospital, St. Mary of Nazareth, Michael Reese Dysfunctional Child Center) and received various medications including Dilantin, Phenobarbital, Mellaril, Tofranil and Ritalin.

Mr. Bies was always in special education classes. He may well have been in Severe Behavioral Handicap classes, as well. Mr. Bies indicates he was frequently truant from school. Mr. Bies states that when he was in the eighth grade, his teacher had the police come to school and search him, telling the police that the defendant had threatened to kill the teacher. Mother corroborates a history of school difficulty. The mother states the defendant would walk away from school when he was angry, and come back later. He was always a loner, had no friends and posed a behavior problem in the school setting.

In terms of medical history, Mr. Bies' mother states he has been diagnosed as having "organic dysfunction on the left side of his brain." As a child, Mr. Bies had a gas stove blow up in his face. He sustained a broken leg, and on one occasion, his brother stabbed him in the eye. When he was twelve years old, he was hit by a bus as he was walking across the street. However, this accident required only some stitches. At present, Mr. Bies claimed no significant health problems.

Mr. Bies denies drug abuse. He states he

drinks alcohol, but indicates he does not drink to excess. Contact with mother, however, reveals she has seen him drink a case of beer at a time. Nonetheless, there is no evidence of intoxication occurring with any regularity.

Michael Bies has three children. He has two sons, both named "Michael", one born in March of 1990 and the other born in April of 1990. Mr. Bies also has a daughter. Mr. Bies was married to the mother of the second "Michael", although he was dating the mother of the older son throughout his marriage. Mr. Bies' ex-wife is Sandra Bies. His girlfriend is Carol Lucky. Mr. Bies and Ms. Lucky have lived together, on and off, for a number of years. They met when Mr. Bies was twelve years old and Ms. Lucky was fourteen years old. Ms. Lucky continues to have contact with the defendant and is supportive of him. Ms. Lucky does indicate Mr. Bies had been violent with her. She states the defendant "slapped me once or twice." On another occasion, "He almost broke my nose." Ms. Lucky states that during her relationship with Mr. Bies he constantly made suicidal gestures such as putting alcohol on his arm and setting it on fire. He would behave in this manner whenever he was angry. Ms. Lucky offered the opinion that the defendant was angry about family relationships. He feels rejected by his father and his mother is described as indiscriminately promiscuous.

In terms of other relevant history, Michael Bies lists his prior criminal justice involvement as an arrest for Carrying a Concealed Weapon in Chicago, and a pending charge of Receiving Stolen Property in

Indiana. He has no employment history to speak of. Mr. Bies receives Social Security (SSI) for his mental disability.

Defendant's Account of Offense: Michael Bies indicates he had been living in Dunraven, Kentucky, with his ex-in-laws. He decided to leave Kentucky and go back to Chicago. A friend of his ex-father-in-law's, a man by the name of Ben Colwell, was driving to Cincinnati. Mr. Bies asked him if he could ride along with him. His plans were to take a bus from Cincinnati to Chicago. Mr. Bies indicates that when he arrived at Mr. Colwell's house in Dunraven, Kentucky, he found that there was another passenger bound for Cincinnati, a man by the name of Darrell Gumm ("Junior"). Mr. Bies indicates that he and "Junior" were dropped off in Cincinnati about 11:30 a.m. He indicates he and "Junior" split up right away. Later, around 2:00 or 3:00 p.m., Mr. Bies indicates he was walking near the expressway when "I ran into Junior again. We were near a park." Mr. Bies states he and "Junior" sat and smoked some cigarettes and drank some beer.

While sitting near the park, Mr. Bies states he saw "Junior" talking to a little boy. Mr. Bies indicates, "Junior talked to the little boy and offered him some money or something. I don't know what for." Mr. Bies states "Junior" took the child "into the house" and Mr. Bies followed. He reported that "Junior" and the victim were in another room and "he was trying to molest him." Mr. Bies states "Junior" was trying to get the little boy's pants down and the little boy was resisting. Mr. Bies indicates "Junior slapped the little boy because he wouldn't

have sex or something."

The defendant says that he saw nothing of the offense since he was in the next room – "I just heard it." Mr. Bies goes on to say that "Junior" carried the boy down into the basement of the house. The boy was crying. "Junior" came back up and Mr. Bies asked him where the boy was. Mr. Bies said "Junior" told him that the boy had left. Mr. Bies indicates he had to urinate and went down into the basement to do so. When he got down there, he found the body of the little boy. He states he checked to see if the child was breathing. He said he was "scared" and "knew he had to get out of there." Mr. Bies said he left, went to the bus station, and took a bus to Chicago.

Not Guilty by Reason of Insanity Criteria: The questions to be answered are: (1) whether, at the time of the alleged act with which he is charged, Michael Bies was suffering from any severe mental disease or defect, and (2) if so, whether this severe mental disease or defect resulted in his not knowing the difference between right and wrong. As a result of my evaluation of Michael Bies, it is my opinion that he does suffer from a mental defect, i.e., mild mental retardation (on the WAIS-R; Verbal IQ = 70; Performance IQ = 67; Full Scale IQ = 68). Mr. Bies' mental retardation is associated with organic brain dysfunction and specific learning disabilities. It is my opinion that Mr. Bies' mental retardation is not of such quantity nor of such quality as to constitute any severe mental defect which would have prevented him from knowing the difference between right and wrong. I base my conclusions on the following discussion.

Although Michael Bies tests within the range of mild mental retardation, he has never required institutionalization for his mental retardation. He goes about the community, unassisted. He carries out the activities of daily life fairly independently. Any inappropriateness or lack of effectiveness in daily life is more related to his chronic personality dysfunction, than it is to his mild mental retardation.

Mr. Bies is the product of a chaotic upbringing. His very early years were characterized by exposure to his alcoholic father's violence. After the father left, the mother was allegedly promiscuous, with men coming in and out of the apartment. Mr. Bies is described as being slow, developmentally, and this may have been intensified by a bout of encephalitis when he was two years old. By the time he was five years old, Mr. Bies was exhibiting significant emotional dysfunction. He is described as chronically angry, having significant difficulties separating from his mother, displaying frequent impulses to hurt himself, lying and inability to function at school (intellectually and behaviorally). By the time he reached teenage years, Mr. Bies was taking his anger out on others, as well as on himself.

Mr. Bies' severe personality disorder, which has its roots in early childhood trauma, makes him highly impulsive. It's not that he doesn't know the difference between right and wrong. Instead, he acts-out impulses as they occur. His mild mental retardation contributes to a lack of common sense which, in turn, highlights or intensifies the defendant's impulsivity. There is a history of acting

without considering the consequences of his actions.

Summary and Conclusions: Michael Bies is a twenty year old, divorced male who was referred for evaluation of his mental state at the time of the alleged act with which he is charged (Aggravated Murder with Specifications). Evaluation reveals a man whose psychological difficulties revolve around: (1) mild mental retardation (Verbal IQ = 70; Performance IQ = 67; Full Scale IQ = 68); (2) organic brain dysfunction characterized by specific learning disability; and (3) a chronic and severe personality disorder characterized by emotional instability, impulsivity, and problems with appropriate control of anger. Mr. Bies' mild mental retardation does constitute a severe mental defect which, in combination with his personality dysfunction, contributed to the alleged act. However, it is my opinion that Michael Bies' mild mental retardation and his severe personality disorder, considered singly or in combination, did not constitute a severe mental disease or defect which would have resulted in his not knowing the difference between right and wrong. In other words, Michael Bies is not a candidate for a plea of Not Guilty by Reason of Insanity.

Thank you for referring Michael Bies to the Psychiatric Center. If we may be of further assistance, do not hesitate to call at 352-3111.

Respectfully,

/s/ Donna Winter, Ph.D.

Clinical Psychologist

If testimony is required on this case, the Court

Psychiatric Center will be represented by Donna Winter, Ph.D., Clinical Psychologist.

DW/tm
9-11-92
BIES.005

COURT REPORT

CENTRAL PSYCHIATRIC CLINIC
COURT PSYCHIATRIC CENTER
216 E. 9th Street - Fifth Floor
Cincinnati, Ohio 45202
(513) 352-3111

NAME Michael Bias DATE OF BIRTH 5-9-72

DOCKET NUMBER B92-5607

OFFENSE Aggravated Murder with Specifications

REF. DATE 8-11-92 EVAL. DATE 10-13-92

COURT DATE 10-13-92

The Honorable J. Howard Sundermann, Jr.
Hamilton County Court of Common Pleas
Cincinnati, Ohio 45202

RE: MITIGATION

Dear Judge Sundermann:

This is in response to your court order that Michael Bias be evaluated with reference to mitigation of penalty, following his conviction on a charge of Aggravated Murder with Specifications, pursuant to Ohio Revised Code 2947.06. Michael Bias was initially interviewed by Shirley W. Leahy, ACSW, LISW, Clinical Social Worker, in the Hamilton County Criminal Justice Center (HCJC) on August 31, 1992 and September 1, 1992. Mr. Bias was further evaluated by the undersigned in the HCJC on September 8, 1992, September 10, 1992, and October 10, 1992. Evaluation was accomplished by interview and administration of the Wechsler Adult Intelligence Scale - Revised (WAIS-R) and the Bender-Gestalt. Prior to the evaluation process, Mr.

Bias was made aware of nonconfidentiality limits. In addition, Mr. Bias was informed about the phases of his trial. He was specifically advised that information given in prior evaluations with regard to his mental state at the time of the alleged acts may be used as a basis for an examination regarding mitigating factors. In addition, Mr. Bias was told he had the right to talk with his attorneys to help him decide if he wished to withhold any information at any point during the evaluation procedure. An explanation statement to this effect was reviewed with Mr. Bias and clarified for him. Mr. Bias indicated his understanding of these factors, both verbally and by his signature. The following summary of my findings and conclusions is based upon: (1) the current evaluation of Michael Bias, together with psychological testing; (2) information received by Ms. Leahy in collateral contact with the defense attorney, Joe Dixon; the prosecuting attorney, Tom Longano; Mr. Bias' mother, Linda Bias; and Mr. Bias' girlfriend, Carol Lucky; (3) review of Mr. Bias' contacts with Mental Health Services at the HCJC; (4) review of a diagnostic evaluation of Michael Bias done at the age of three years-ten months, by the Dysfunctional Child Center of the Michael Reese Hospital and Medical Center, Chicago, Illinois; and (5) review of records of the defendant's past psychiatric hospitalizations at Chicago-area hospitals (St. Mary of Nazareth, 1986; Loretto Hospital, 1986; Chicago Reed Mental Health Center/Henry Horner, Children's Center, 1988). Additional information with regard to Mr. Bias' developmental history has been requested, but not received at the time of the writing of this report.

These records would include school information (Cook County Board of Education, Chicago; Edgetown School; Southern School; Victor Newman School), medical records (Susan Balverde, M.D., pediatrician, Chicago) and records of the defendant's psychiatric hospitalizations at the ages of five years old and seven years old at Ridgeway Hospital.

Relevant History: Michael Bias was born in Wisconsin and raised in Chicago as the second of his mother's three children. Mr. Bias and his younger sister are the product of a relationship between mother and a man by the name of Michael Alvin Johnson. Mr. Bias indicates the father of his older brother is in a penitentiary serving time for Murder. Mr. Bias was raised by his mother. His father disappeared from his life early on. According to Mr. Bias' mother, the father left when the defendant was one year old. The mother and father reunited one year later, but then separated permanently. The mother describes his father as abusive and violent to her. He was an alcoholic who would periodically tear up the house. Mr. Bias' mother states she remembers that once when the defendant was two and a half years old, he (the defendant) took a frying pan and hit his father over the head when the father was beating up the mother.

Information from the defendant's mother and from past psychiatric evaluations indicates Mr. Bias exhibited a good deal of anger since childhood. At the age of three years-ten months, the family pediatrician (Susan Balverde, M.D.) referred Mr. Bias to the Dysfunctional Child Center of the Michael Reese Hospital and Medical Center with the

chief complaint of "violent and uncontrollable." The defendant was cursing, threatening and acting-out toward peers by that age. As he developed, he became difficult to control and the mother often had to restrain him physically. Mr. Bias' mother indicates Mr. Bias would destroy furniture. Once, he hit her and she had to call the police.

In addition to difficulty with hostility and temper, Mr. Bias apparently exhibited developmental delays from birth. He was almost a year old before he could sit up and almost two years old before he could walk. When evaluated at the Dysfunctional Child Center (see above) at the age of three years-ten months, Mr. Bias was not yet toilet trained. He had repeated illnesses (mostly pneumonia) as a child, as well as "sleeping sickness" (encephalitis). These may have resulted in developmental delays and intellectual deficiency. Mr. Bias has always been in special education classes. He was disrupting class as early as kindergarten and required special placement. Later, he was expelled from public schools and placed in "therapeutic schools", schools which deal with severe behavior problems. Mr. Bias remembers "I'd get frustrated with my teachers. I would just blow up right away and walk out. I wouldn't go to school half the time and I missed more than I ever went." Mr. Bias also said that in one of the private schools (Victor Newman School), "They had permission to restrain you and hold you down until you could come off your anger." He remembers being restrained there "nine times, maybe more." Mr. Bias states he was expelled from Victor Newman because "this lady teacher screamed at me and I punched her in the

mouth."

Mr. Bias has a history of psychiatric hospitalizations for suicidal gestures and suicidal threats. Records indicate he attempted to hurt himself as early as the age of five years old. There are two psychiatric hospitalizations at the ages of five years old and seven years old (referred to in records of later psychiatric hospitalizations), records of which, however, are not available at this time. Mr. Bias' mother states she found him trying to cut himself with scissors at an early age, and there was an episode where he threatened to jump out of a window. Mr. Bias has received a number of psychiatric diagnoses: Attention Deficit/ Hyperactivity Disorder; Adjustment Disorder with Depression; Mixed Special Developmental Disorder; Adjustment Disorder with Mixed Disturbance of Emotions and Conduct; R/O Bipolar Affective Disorder; R/O Dysthymia. While the defendant's mother states he was diagnosed as having "organic dysfunction on the left side of his brain" and that diagnosis also appears in hospital records, this may refer to the presence of specific learning disabilities (developmental delays in language and reading; inability to read) since an electroencephlogram (EEG) administered to the defendant in January of 1986 did not yield abnormal results.

Michael Bias denies drug abuse. He states he drinks alcohol, but indicates he does not drink to excess. Contact with his mother, however, reveals she has seen him drink a case of beer at a time. His girlfriend, on the other hand, (Carol Lucky, mother of the defendant's oldest child), denies Mr. Bias

drank on any regular basis. Mr. Bias does have three children. He has two sons, both named "Michael", one born in March of 1990 and another born in April of 1990. Mr. Bias also has a daughter. Mr. Bias was married to the mother of the second "Michael", although he was dating the mother of the older son (Carol Lucky) throughout his marriage. Mr. Bias and Ms. Lucky have lived together, on and off, for a number of years. They met when Mr. Bias was twelve years old and Ms. Lucky was fourteen years old. Ms. Lucky continues to have contact with the defendant and is supportive of him. She does state that Mr. Bias had been violent with her. She indicates the defendant "slapped me once or twice." On another occasion, she states, "He almost broke my nose. He snapped when I said me and Mikey (their son) are going to leave you." Ms. Lucky states she had to go to the Emergency Room where she found Mr. Bias had fractured a bone in her face.

In terms of other relevant history, Michael Bias lists his prior criminal justice involvement as an arrest for Carrying a Concealed Weapon in Chicago, and a pending charge of Receiving Stolen Property in Indiana. He has no employment history to speak of. Mr. Bias receives Social Security (SSI) for his mental disability. He has been receiving SSI since at least the age of fourteen years old.

Psychological Functioning: Mr. Bias' mother had her first child at the age of seventeen years old. She was nineteen years old when she had Michael Bias. By the time Mrs. Bias brought Michael to the Dysfunctional Child Center of the Michael Reese Hospital and Medical Center she was a twenty-three

year old, single mother, supporting herself and three children on Welfare. Those records reveal a chaotic home situation, with neglect and abuse. Michael Bias is described as a three year old child whose "clothes and body are very dirty." The home situation is described as "extremely unstable with multiple moves, a natural father who apparently was in and out of the family and has now disappeared, and a new male figure in the family for the past two years who Michael identifies as his father. Apparently there has been a good deal of violence with beating in the home, although it is not clear whether weapons have been used." The reason for the referral was "violent and uncontrollable." Most three years old are not "violent and uncontrollable." However, children who have experienced a good deal of violence often imitate the violence around them.

Mr. Bias must have been exposed to extreme chaos and violence within the home because his behavior at that young age was extraordinary and extreme: "He assaults other children and himself, often with dangerous objects such as cut glass or knives. He also has been known to attempt to choke his peers and his baby sister and himself by placing a rope around the neck and pulling. Apparently his baby sister was found cyanotic during one of these attacks. He bites himself, slaps his face . . . he awakens in the middle of the night and will wander, leaving the house and wander in the street . . . he will fly into a rage when he does not get his way when he seeks attention but frequently from very minimal precipitant causes and in his rage as he is completely unreachable. When they are over, he appears not to remember what he has done and in

fact, is often surprised when he is told that he has hurt somebody." The psychiatric evaluation of three year-ten month old Michael Bias at the Dysfunctional Child Center concludes, "physical violence is inflicted on self or 'other' without apparent awareness of difference and at these times he is in danger of committing homicide or suicide without any awareness of the consequences of his acts."

Mr. Bias continued throughout his developmental years acting out toward others and toward himself. Records of his psychiatric hospitalizations at the ages of five years old and seven years old are not available. The next available record is that of a psychiatric hospitalization at St. Mary of Nazareth (Chicago) when the defendant was thirteen years old. The precipitant for the hospitalization was that Mr. Bias "took more than two swings with a knife at his brother's face. The brother protected himself with a trash lid until the mother arrived to control the patient." When his mother tried to calm him down, Mr. Bias said he was "fed up with it all" which the mother said she knew meant he was about to make a suicidal gesture. Mr. Bias' mother stated at the time that he was attending Edgetown Therapeutic School he would return home from school in a "sad" mood. He would then "sneak out of the house and roam the streets for hours." When he returned, his mother would scold him and an argument would ensue. It was at times like this that the defendant vacillated between hurting himself and hurting others. The psychiatrist doing the examination at the time notes, "Patient states when he has these moods of sadness/rage he

leaves house to prevent 'hurting his family'." Hospital records at the age of thirteen years old talk about multiple fights the defendant was in "with anyone either larger or smaller than he." The records further note, "Patient expelled from public schools past two years for disrupting classes. Mother states patient is 'slow learner and hates therapeutic school he attends this year because teacher is strict and does not allow him to take command'." Further history taken from the mother at this time includes a history of four suicide attempts. At the age of five years old, hospital records state Mr. Bias tried to jump out of a window. At the age of nine years old, he tried to poke his wrists with scissors in the bathroom. At the age of eleven years old, he tried to jump off the third floor of his uncle's house. Two psychiatric hospitalizations at Ridgeway ensued. While at Ridgeway, Mr. Bias attempted suicide again using hospital curtain ropes, but he was stopped by nurses.

At the age of fourteen years old, Mr. Bias was admitted to Loretto Hospital in Chicago "for treatment of suicide threats." The treating psychiatrist at that time notes, "Chief characteristic was his exquisite sensitivity to any kind of frustration and his rapid tendency to get enraged." When he was fifteen years old, Mr. Bias was admitted to the Chicago Reed Mental Health Center/Henry Horner's Children's Center as an emergency admission. He was referred by Loretto Hospital Emergency Room after he "allegedly threatened his mother and attempted to cut his sister's throat." Later, hospital staff seemed to agree (on the word of Mr. Bias and his mother) that he had

verbally threatened, but never brandished a knife. While Mr. Bias was given a diagnosis of "depression", this was the first hospitalization to question the presence of what is called a "borderline personality disorder."

Indeed, the defendant meets most of the criteria for this disorder. Two of the hallmarks of this disorder are: (i) inappropriate, intense anger or lack of control of anger; (2) recurrent suicidal threats, gestures, or behavior, or self-mutilating behavior. Mr. Bias' problems with rage are evident from the history. He also has a history of self-mutilation. Mr. Bias is known to place alcohol on his skin and set himself on fire. The mother of his oldest child, Carol Lucky, indicates that whenever Mr. Bias "got pissed off", he would put alcohol on his arm and set it on fire. She states, "He says pain doesn't bother him. He's built up so much anger, pain doesn't bother him." When asked abut this, Mr. Bias indicated, "I've had so much pain in my life, physical pain doesn't bother me. In addition to setting fire on his skin, Mr. Bias states he has cut his wrists with a knife and tattooed his arms "with a sewing needle and India ink."

In addition to this chronic and severe personality disorder, the defendant has impaired intelligence. He currently tests within the range of mild mental retardation (Verbal IQ = 70; Performance IQ = 67; Full Scale IQ = 68). However, Mr. Bias appears to function within the range of borderline mental retardation. That is, he functions on a slightly higher level than test results would indicate, although all IQ scores have a band of

accuracy of five points plus or minus. Therefore, Mr. Bias' Verbal IQ may be stated, with confidence, to fall within the range of 65-75. The Verbal IQ = 75 is within the range of borderline mental retardation. Such a score would place the defendant somewhere within the bottom 7% of the general population his age. Ninety-three percent of the general population the defendant's age is more intellectually capable than he. In addition to an intellectual deficiency, Michael Bias is functionally illiterate. Mr. Bias doesn't think logically. He often contradicts himself and doesn't seem to grasp the total picture of his circumstances with anything but superficial understanding. As an example of the concrete and illogical way in which he thinks, Mr. Bias told me he was concerned because he had not heard anything about his pending charge of Receiving Stolen Property in Indiana. He told me, "I don't want to have to worry about that hanging over my head when I get out of prison." He was reminded he was facing the death penalty and that the charge in Indiana was insignificant in comparison with receiving the death penalty, or receiving a sentence of life in prison. Another example of the defendant's failure to grasp what is going on around him occurred when, on October 10, 1992, I asked him whether his case had yet gone to the jury, or not. Mr. Bias didn't know what I was talking about, telling me that a jury had been seated (on the first day of his trial). I again asked him whether "closing arguments" had been made in his case. He didn't know what I was talking about. It was only when I specifically asked him whether or not there was a jury somewhere, anywhere, sitting and deliberating

his fate at that very moment, but the defendant was able to tell me that was not the case, and his trial would resume on October 13, 1992.

Summary and Conclusions: Michael Bias is a twenty year old, divorced male who was referred for evaluation of mitigation of penalty, following a finding of guilt on a charge of Aggravated Murder with Specifications. Evaluation reveals a man whose psychological difficulties revolve around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction characterized by specific learning disabilities. As outlined above, Michael Bias is the product of a chaotic upbringing. His very early years were characterized by exposure to his alcoholic father's violence. The mother did not take good care of the children since by the time she was twenty-three years old, she had three children and was a single mother on Welfare. Mr. Bias' girlfriend and the mother of his oldest child, Carol Lucky, indicates that there was a time when she and Mr. Bias lived with the defendant's mother. She states that during the course of one month when they lived with the mother, the mother brought in "thirty different guys." The initial contact of mental health and health professionals with Michael Bias when he was three years-ten months old, indicates his clothes and body were dirty. He already had a history of "multiple self-inflicted injuries, often with little acknowledgement of pain." By that time, Mr. Bias was already described as "slow and with apparent hearing loss, delayed speech and speech

difficulties." Mr. Bias' verbalizations at that young age probably reflect and mirror what he was hearing in his own home. Mr. Bias was noted to throw a Raggedy Ann doll around while verbalizes threats to her: "I'm gonna beat you up." Later he said, "I kill you."

As the defendant matured, he continued to exhibit the same kinds of difficulties. He inflicted pain on himself without much acknowledgement of that pain. He also acted-out toward others. Mr. Bias has always had difficulty controlling angry impulses. He has never been able to function within the public school system, instead requiring what are called, in Chicago, "therapeutic schools." These are school settings for severely behaviorally handicapped individuals, schools which often are required to restrain the student, physically. Even under these special circumstances, Mr. Bias failed to adjust. He admits he assaulted one teacher, he constantly disrupted the class and he eventually dropped out of school.

Michael Bias has exhibited impulsive behavior throughout his lifetime. He has received multiple medications including Mellaril (a major tranquilizer), Ritalin (for symptoms of Attention Deficit/Hyperactivity Disorder), Dilantin (for a possible seizure disorder), etc. The defendant has received a number of different diagnoses with the overall picture of significant emotional dysfunction and a basic failure to succeed in any part of his life, i.e., school, vocation, personal relationships or social relationships.

Thank you for referring Michael Bias to the

Court Psychiatric Center. If we may be of further assistance, please do not hesitate to call at 352-3111.

Respectfully,

/s/ Donna Winter, Ph.D.

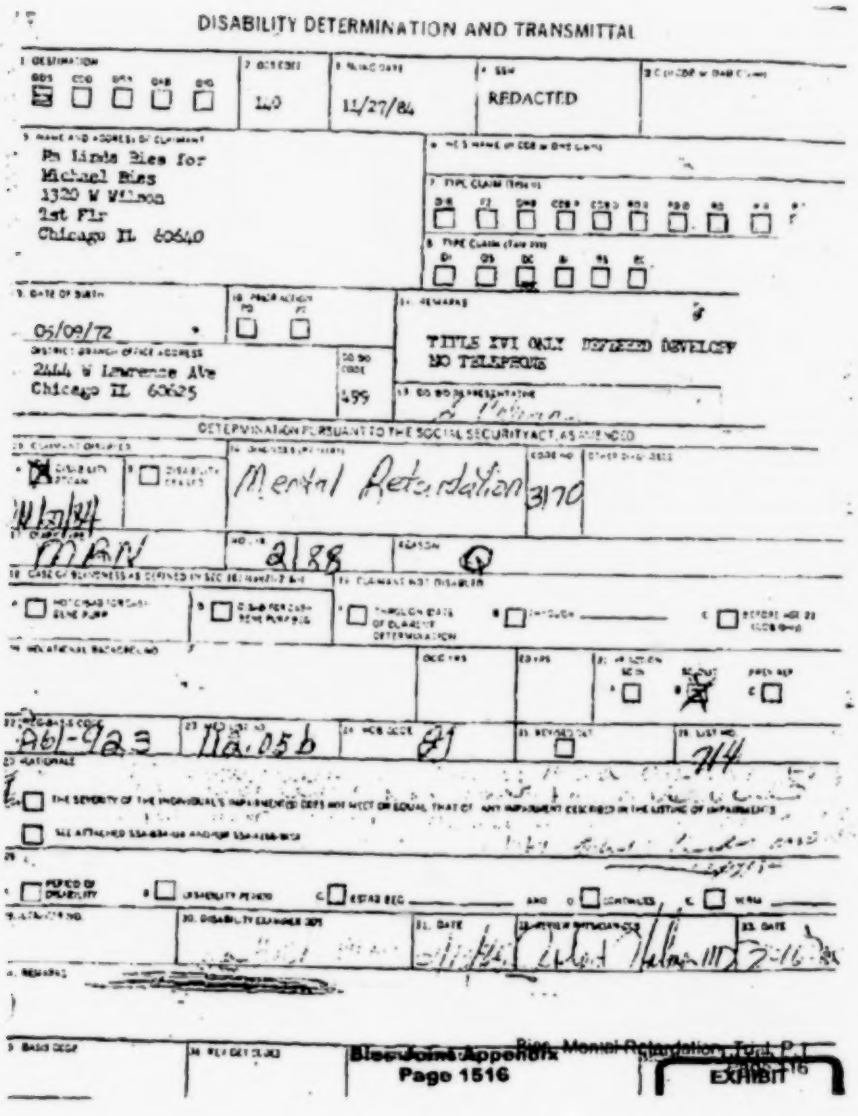
Clinical Psychologist

If testimony is required on this case, the Court Psychiatric Center will be represented by Donna Winter, Ph.D., Clinical Psychologist.

DW/tm
10-13-92
BIAS.001

DISABILITY DETERMINATION AND TRANSMITTAL

(November 27, 1984)



DISABILITY DETERMINATION AND TRANSMITTAL

5	40	11/27/84	REDACTED

Pk Linda Bies for
Michael Bies
1320 W Wilson
2st Flr
Chicago IL 60640

05/09/72

2444 W Lawrence Ave
Chicago IL 60625

499

TITLE XVI ONLY DOPPEED DEVELOPY
NO TELEPHONE

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

Mental Retardation 3170

11/27/84

MAN 2188 Q

A61-923 11.05b 84 714

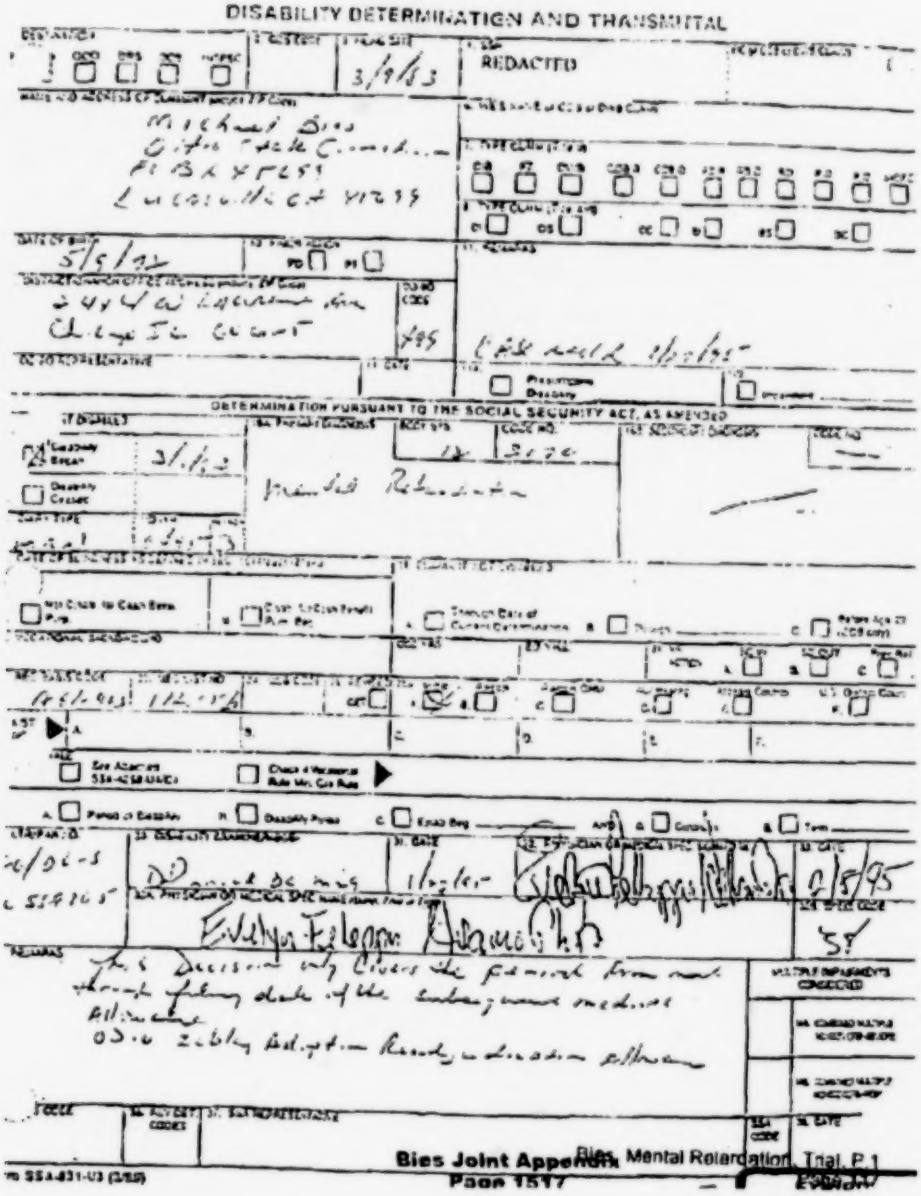
Blee Mental Retardation Jt Ad. P. 1

Blee Joint Appendix
Page 1516

EXHIBIT

DISABILITY DETERMINATION AND TRANSMITTAL

(March 9, 1983)


DISABILITY DETERMINATION AND TRANSMITTAL

REDACTED

DETERMINATION PURSUANT TO THE SOCIAL SECURITY ACT, AS AMENDED

MEYER PSYCHOLOGICAL EVALUATION

CONSULTATIVE EXAMINATIONS, INC.
17 North State Street Suite 1000
Chicago, Illinois 60602

(Dated February 6, 1985)

Illinois Bureau of Disability Adjudication Services
Post Office Box 3842
Springfield, Illinois 62708

Regarding Claim of:
Michael Bies
SSN: REDACTED
Adjudicator: S. Halman E:06-484

Date of Examination: February 4, 1985

Michael Bies had a Psychological Evaluation performed on February 6, 1985

REASON FOR REFERRAL:

Michael Bies was referred for psychological evaluation for determination of Intellectual Functioning. This information will be used in the determination of Social Security Disability Benefits.

GENERAL INFORMATION:

Michael Bies, is a youth of 12-years of age, who came to the test situation accompanied by his mother. She expressed some reluctance of bringing him here, because she states that he has been given testing

only a few weeks ago when he was hospitalized. Michael would be described as a rather frightened and overactive child of 12-years of age. As soon as he sat in the chair, he began wiggling in the chair and fiddling with things that were on the desk. He was able to give information about himself, and both seemed to show some willingness to please along with a very high level of anxiety. He states that now he goes to Edgetown, which is a theraputic school, and that he has been there since he was released from Henry Horner Children's Pavillion at the Read Zone Center. He would be described as restless, somewhat dirty, and very willing to talk. History reveals that Michael has had problems since before the age of 5, when he was taken to Michael Reese Hospital. His problems were described as depression, suicidal behavior, and hyperactive behavior. In addition to that, he stays on a decongestant, has ear aches, and some losse of hearing at certain times. His mother described him as anemic, and asthmatic. Currently, he is maintained on Mellaril, 50 mg. twice daily. He was discharged from Henry Horner on January 15, 1985, and had been hospitalized there because of attempted suicide. He is frequently picked on my other people, and indeed, his mother speaks of him in discouraging tones. Overall, diagnosis from Read was a borderline personality [illegible]. Michael lives with a brother who is 14, and a sister who is 10. He, himself said that he frequently is depressed, and that he should see a therapist. Reaction to the test was one of giving up very easily, and showing a great deal of pulsivity. Concentration was not good, although cooperation was adequate.

TEST RESULTS

Results of the Wechsler Intelligence Scale for Children-Revised are as follows:

Verbal Subtest Scores

	Raw	Scaled
Information	6	1
Similarities	8	5
Arithmetic	7	3
Vocabulary	17	2
Comprehension	11	4
Total		15

Performance Subtest Scores

	Raw	Scaled
Picture Completion	6	1
Picture Arrangement	4	1
Block Design	4	1
Object Assembly	21	8
Coding	30	3
Total		14

These test results give him a Verbal IQ of *57*, a Performance IQ of *52*, and Full Scale IQ of *50*.

Consequently, he would be seen as functioning in the category of mildly mentally retarded. A further look at the test results suggest that his best area is in the Object Assembly, where he was able to spend some time organizing the materials. Second to this, he did adequately in Similaritie, which calls for some degree of abstract thinking. He had most difficulty in Block Design, Picture Arrangement, Picture Completion, and the Information portion of the test.

He does seem to have some mild organicity.

Results of the Peabody Picture Vocabulary Test give him a standard score of *42*, which place him in the lowest 1% of the population, with a stanine score of *1*, and an age equivelant of *7 years and 2 months.*

At this time, Michael would be seen as a child with multiple problems.

In the preparation of this report, there was no further information in the folder on Michael.

The time of the testing was 50-minutes.

Thank you for referring this patient to us. If you have any further questions, please do not hesitate to call.

Sincerely,

/s/ Eileen Meyer, M.A.
Registered Psychologist

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B925607
(Dated September 19, 1996)

MICHAEL BIES,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

AFFIDAVIT OF KRISTEN E. HASKINS

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I Kristen E. Haskins, being first duly sworn and cautioned according to law, state the following:

1. I am a psychologist, licensed to practice in Ohio since 1982. I hold a Doctor of Psychology (Psy.D.) degree from the School of Professional Psychology, Wright State University. For over twelve years I worked at the Netcare (formerly Southwest) Forensic Psychiatry Center, leaving there as director in November 1993. I have adjunct faculty affiliations with Ohio State University and Wright State University and formerly with Antioch University. I currently am in private practice, specializing in clinical and forensic psychology.

2. My attached curriculum vita is a true and accurate copy of my qualifications and employment history. I have worked in the area of criminal forensic psychology for almost fifteen years,

performing psychological evaluations to assess competency to stand trial, criminal responsibility and mitigation in capital cases. I have been involved in the examination of over sixteen hundred criminal defendants, including at least two hundred charged with murder and approximately twenty defendants in capital cases. I have offered testimony at trial as an expert witness for both the prosecution and the defense.

3. I have conducted a preliminary evaluation of Michael Bies having been retained to do so by counsel.

4. In preparation for my formal evaluation of Michael Bies, I reviewed a number of documents provided to me by his defense counsel, including a transcript of mitigation proceedings, psychological evaluations prepared at trial, and medical and psychological records obtained by counsel.

5. I examined Michael Bies on Friday, September 13, 1996 at the Mansfield Correctional Institution in Mansfield, Ohio. My direct contact time with Michael Bies at this point has been four and one half hours.

During that time, I conducted a clinical interview and also administered a mental status examination, Wechsler Adult Intelligence Scale - Revised, Wide Range Achievement Test - Revision 3, Bender Visual Motor Gestalt, House-Tree-Person and AAMR Adaptive Behavior Scale - Residential and Community 2nd Edition.

6. Based upon my clinical examination of Michael Bies, the results of my psychological testing

of him, and my review of all documents concerning him which have been made available to me, I am able to form several conclusions within the bounds of reasonable psychological certainty concerning Michael Bies' personality functioning, mental status and mental condition.

7. The background history of Michael Bies, as provided to me, both by him and by others, indicates that his early childhood years were marked by chaos, neglect, abuse and parental inconsistency and rejection which resulted in the development of abnormal personality characteristics. He displays: low self esteem; a pattern of unstable and intense interpersonal relationships; identity disturbance; emotional instability with a marked reactivity of mood; recurrent suicidal behavior, gestures and threats as well as self-mutilating behavior; inappropriate, intense anger and difficulty controlling anger and transient, stress related paranoid thinking as well as possible dissociative symptoms.

8. Michael Bies' intellectual functioning is in the borderline to mild mental retardation range. His current Full Scale IQ on the Wechsler Adult Intelligence Scale - Revised is 72 +/- 5, which ranks approximately at the 2nd percentile. This means that compared to others his age in the normative sample, Mr. Bies scored better than 2 percent of the norm group or that 98% on the norm group scored better than he did. His IQ score is two standard deviations below the mean, which indicates a significantly below average performance on this test which overall measures ability to think rationally,

act purposefully and deal effectively with one's environment.

9. It is now well established by research and clinical observation that children who have been abused and neglected present with a multitude of emotional and behavioral difficulties including: anxiety, aggressive behavior, paranoid thinking, posttraumatic stress disorder, depression and an increased risk of suicide behavior. Abuse also appears to increase the risk of psychiatric disturbances in children who are already vulnerable. Chronic maltreatment has been identified as one of the precursors of aggressive and violent behavior in vulnerable children. Sexually abused children are reported to have an increased frequency of poor self esteem, depression, dissociative disorders and substance abuse.

10. My evaluation of Michael Bies and the available collateral information strongly suggest the presence of central nervous system dysfunction which may affect Mr. Bies' cognitive processing ability, including nonverbal reasoning functions, as well as the ability to interpret complex events occurring within the context of extremely stressful circumstances. Exploration of such deficits is essential and requires neuropsychological testing, neurological examination, possibly an M.R.I, a complete physical examination and possibly full-body x-rays.

11. Exploration of these issues is essential to an accurate evaluation of Michael Bies in order to assess adequately the impact of such dysfunctions upon Mr. Bies's ability to appreciate the

wrongfulness of his behavior and his capacity to control his conduct at the time of the offenses in question.

12. Each of the assessment procedures I recommend was available at the time of Mr. Bies's pre-trial evaluations and should have been administered in order to present to the jury a comprehensive and accurate assessment Mr. Bies's ability to comprehend the wrongfulness of his behaviors and his capacity to control his conduct at the time of the offenses in question.

Further affiant sayeth naught.

/s/ Kristen E. Haskins, Psy.D.

Sworn to and subscribed before me, a Notary Public, on this 19th day of September, 1996.

/s/ Notary Public

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B925607
(Filed August 15, 2003)

STATE OF OHIO,

Plaintiff-Respondent

v.

MICHAEL BIES ,

Defendant-Petitioner

MICHAEL BIES' MOTION FOR SUMMARY JUDGMENT AS TO THE THIRD CAUSE OF ACTION

Now comes Michael Bies, pursuant to Rule 56 of the Ohio Rules of Civil Procedure and O.R.C. § 2953.21(D), and moves this Court for an order that Michael Bies is mentally retarded and therefore cannot be executed. The reasons for this Motion are more fully set forth in the attached Memorandum of Law.

Respectfully submitted,

/s/ S. Scott Haynes

S. Scott Haynes - 0059586
Hallowes, Allen & Haynes
1616 Brice Road
Reynoldsburg, Ohio 43068
(614) 868-0009
Fax (614) 868-0029

And

David H. Bodiker
Ohio Public Defender
Randall L. Porter – 005835
Assistant State Public Defender
Office of the Ohio Public Defender
8 E. Long St., 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax (614) 728-3670
COUNSEL FOR PETITIONER

MEMORANDUM OF LAW

I. INTRODUCTION

This matter comes on before this Court after having completed three trips through the entire Ohio Court system (trial court, Hamilton County Court of Appeals and the Ohio Supreme Court). During the initial trip the appellate courts found Michael Bies to be mentally retarded. *State v. Bies*, No. C-920841, 1994 Ohio App. LEXIS 304 (Ham. App. March 30, 1994); [Motion Exhibit 1]; *State v. Bies*, 74 Ohio St. 3d 320, 327 (1996). During the post-conviction process, this Court also determined that Michael Bies is mentally retarded [Motion Exhibit 2]. The Hamilton County Prosecutor's Office has at least three times conceded in writing that Michael Bies is mentally retarded [Motion Exhibits 3, 4, 5].

The reason for all of these judicial findings and prosecutor's concessions is simple. The record as it exists before the Court permits but one conclusion: that Michael Bies is mentally retarded. For the

reasons set forth herein the Court should reach the same conclusions all the courts did before it and determine that Michael Bies is mentally retarded and entitled to relief from his sentence of death.

II. THE UNCONTROVERTED FACTS BEFORE THIS COURT

Michael Bies was born to Linda Bies and Michael Johnson. Linda almost miscarried with Michael at four and six months. At seven months Michael's father struck Linda in the stomach. At birth Michael was black from a lack of oxygen. [Motion Exhibit 6].

Michael was developmentally delayed. He did not learn to sit up until the age of one, he did not walk with proficiency at the age of two [Tr. 1096/96] and he was still not toilet trained at the age of three. [Tr. 1096.]

Michael was a very sickly child. At the age of two months he was hospitalized for pneumonia and dehydration [tr. 1097]. At the age of one year he was again hospitalized for pneumonia [Tr. 1097]. When he was two he was back in the hospital for encephalitis or inflammation of the brain [Tr. 1097]. At the age of three he had a laceration on the head which his mother said that he received from falling off a dresser [Tr. 1097]. When he was five he was hospitalized for the measles. At the same age he burned himself on the stove or radiator but could not feel the pain. Still later that year he was placed in a psychiatric hospital for a suicide attempt. [Tr. 1098]. At one point in his childhood he was struck by a bus.

Throughout his childhood Michael was

confined and treated in psychiatric hospitals. [Defendant's Mitigation Exhibit 3, p. 3] The school officials diagnosed Michael as suffering from learning disorders and they arranged for him to attend special education classes. However his performance in those classes was so abysmal that school officials placed him a therapeutic school. [Defendant's Mitigation Exhibit 3, p. 3.]

At the age of fourteen the Social Security Administration diagnosed Michael as having mental retardation and determined that he was eligible to receive with monthly SSI payments. [Tr. 1107] He continued to receive these payments up until the time of his trial.

B. Petitioner's Capital Trial Proceedings.

After Michael's arrest in the present case, trial counsel filed a Not Guilty By Reason of Insanity plea and the trial court appointed three independent experts to evaluate Michael. Dr. Myron Fridman in his report stated: "Michael Bies is a marginally functioning, mildly mentally retarded man from a dysfunctional family background who has never fully achieved satisfactory life adjustment" [Motion Exhibit 7 p. ___]. Dr. Fridman observed that Michael's "though processes [were] . . . at times somewhat illogical" [Motion Exhibit 7, p. __]. Dr. Donna Winter, who worked for the Hamilton County Court Clinic, concluded that Michael "appeared to function in the range of borderline mentally retarded. [Defendant's Mitigation Exhibit 3, p. 6]. Dr. Winter concluded in her sentencing report that "Mr. Bies doesn't think logically. He often contradicts himself and doesn't seem to grasp the

total picture of his circumstances with anything but superficial understanding" [Defendant's Mitigation Exhibit 3, p. 6].

Michael has an IQ of 68 and suffered from mild to borderline mental retardation [Tr. 11054, 1117]. He was functionally illiterate [Defendant's Mitigation Exhibit 3, p. 6]; he was operating on the level of a third to sixth grader [Tr. 1117]; he suffered from brain damage which caused him to be learning impaired [Tr. 1117] and he was hearing voices [Tr. 1100].

Michael could not understand the proceedings at trial. [Tr. 1085]. He could not even tell the psychologist in what stage the trial had progressed [Tr. 1118]. He did not know what closing argument was [Tr. 1118]. Michael sat and drew pictures throughout the proceedings [Defendant's Mitigation Exhibit 1]. Dr. Winter described his drawings as very "primitive." [Tr. 1105]. Michael while awaiting trial was more concerned about a pending theft charge in the State of Indiana than his capital case in the State of Ohio. [Tr. 1119].

During the mitigation hearing, Michael wrote a two paragraph statement for the jury. [Tr. 1088, Defendant's Mitigation Exhibit 2]. Michael was unable to read this two paragraph statement to the jury [Tr. 1088].

During closing argument in the mitigation stage, defense counsel argued that the jury should not vote to execute Michael because he was operating at the level of a third grader because of his low IQ. [Tr. 1157-1159, 1164, 1169]. The trial prosecutor stated that Michael had an IQ of 68 and concluded

that "Contrary to the closing argument by Mr. Deardorff, his IQ is not 63, it's 68. It's in the report if you'd like to see it. Michael Bies is not intelligent. I think that we can all accept that." [tr. 1180]. The jury, after deliberating for almost ten hours, returned a verdict recommending that Michael be sentenced to death. [Tr. 1205-1206, 1210].

After the death verdict, defense counsel Timothy Deardorff told the Cincinnati Enquirer that Bies could not comprehend his own trial. [Motion Exhibit 8]. According to the Enquirer "His attorneys said he was more concerned with his legal fees than being condemned to die. He did not understand, Derdorff said, that his lawyers were court-appointed." [*Id.*]

C. The State Court Findings Of Mental Retardation

The Hamilton County Court of Appeals on Michael Bies' direct appeal of right to that Court determined that Michael Bies suffered from "mild mental retardation to borderline mental retardation." *State v. Bies*, No. C-920841, 1994 WL 102196 (Ham. App. March 30, 1994), p. **10. [Motion Exhibit 1]. On direct appeal to the Ohio Supreme Court that Court concluded that Michael suffered from "mild to borderline mental retardation." *State v. Bies*, 658 N.E.2d 754, 761 (1992).

III. THE STANDARD FOR GRANTING A MOTION FOR SUMMARY JUDGMENT.

Pursuant to Rule 56 of the Ohio Rules of Civil Procedure, Summary Judgment shall be rendered if:

1) no genuine issue as to any material fact remains to be litigated, 2) the moving party is entitled to judgment as a matter of law, and 3) that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977); *Zivich v. Mentor Stockard Club, Inc.*, 82 Ohio St. 3d 367, 369 (1998); *Miller v. Athletic Co.*, 80 Ohio St. 3d 607, 617 (1998).

Summary judgment is appropriate when the non-moving party has failed to make a sufficient evidentiary showing to establish the existence of an element essential to his case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Wing v. Anchor Media*, 59 Ohio St. 3d 108 (199). When there is a "complete failure of proof concerning an essential element of the nonmoving party's case" summary judgment shall be granted. *Crtesher v. Burt*, 75 Ohio St. 3d 280, 288 (1996). *See also Vahila v. Hall*, 77 Ohio St. 3d 421 (1997).

In the present case the State has not cited to any judicial holding that concluded that Michael Bies is *not* mentally retarded. The State has not offered any affidavit or report of any experts that contradict mental retardation. The State has not even attempted to explain its prior numerous concessions that Michael Bies is mentally retarded.

O.R.C. § 2953.21(D) permits either party to a post-conviction action to file a motion for summary judgment. The Ohio Supreme Court has held that Ohio R. Civ. P. 56, and the cases interpreting the rule are applicable to summary judgment motions filed pursuant to O.R.C. § 2953.21(D). *State v.*

Milanovich, 42 Ohio St. 2d 46, 51 (1975). Trial courts must strictly adhere to the provisions of Ohio R. Civ. P. 56 when deciding summary judgment motions in post-conviction cases:

> In post-conviction cases, only careful adherence to the provisions of Civ. R. 56 can assure that the rights and obligations of both parties are fairly treated and respected.

[*Id.* at 52.]

It is anticipated that the State, in its response may cite to *State v. Calhoun*, 86 Ohio St. 3d 279 (1999). In *Calhoun*, the Ohio Supreme Court addressed the issue of the manner in which trial courts were to consider affidavits that petitioners submitted in post-conviction proceedings. Michael Bies, in this motion, relies primarily upon prior findings of this Court, the Hamilton County Court of Appeals and the Ohio Supreme Court; repeated concessions made by the Hamilton County Prosecutor's Office; and the findings made by the experts appointed by this Court. Consequently *Calhoun* is not applicable to this pleading.

III. THE RECORD PERMITS ONLY ONE CONCLUSION, MICHAEL BIES IS MENTALLY RETARDED.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court ruled the execution of mentally retarded defendants are "cruel and unusual punishments" prohibited by the Eighth Amendment. The Court observed:

> Because of their disabilities in areas of reasoning, judgment, and control of their

> impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

Atkins v. Virginia, 536 U.S. 306-307.

In *Atkins*, the United States Supreme Court cited to the definition adopted by the American Association of Mental Retardation ("AAMR") in 1992 and to the definition adopted by the American Psychiatric Association ("APA") in the DSM-IV. *See Atkins*, 536 U.S. at 309, n.3. The AAMR has now further refined its 1992 definition. *Mental Retardation: Definition, Classification, and Systems of Supports 1* (Ruth Luckasson ed., 10th ed. 2002) (hereafter "*Mental Retardation* (2002)")

The Ohio Supreme Court has adopted the tests identified by the United States Supreme Court in *Atkins*;

> Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. *Id.* at fn.3, citing definitions from the American Association of Mental Retardation and the American Association of Mental Retardation and the American Psychiatric Association. These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-

> direction, and (3) onset before the age of 18. Most state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below.

State v. Lott, 97 Ohio St. 3d 303, 305 (1992).

A defendant, pursuant to all of the above tests, to be declared mentally retarded, must 1) have subaverage intelligence, 2) suffer from significantly impaired adaptive skills and 3) have the mental disability manifest itself before the age of eighteen. Michael Bies meets all three criteria with respect to any of the definitions.

A. Michael Bies Suffers from Subaverage Intelligence

The AAMR pursuant to the most recently revised definition defines significant limitation in intelligence functioning as "approximately two standard deviations below the mean, considering the SEM [Standard Error Measurement] for the specific assessments instrument used and the instrument's strengths and limitations." *Mental Retardation* (2002) at p. 58. The Supreme Court in *Atkins* noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition." 536 U.S. at 309 n.5. All of Michael Bies' IQ scores are below 75.

On April 8, 1983 Consultative Examinations Inc. of Chicago, Illinois examined Michael. [Motion Exhibit 9.] Dr. Rodriguez, M.D. noted that Michael's "intelligence estimated to be below normal, possibly mentally retarded." (Id. at p. 2.) The Medical

Doctor's report reflects the following:

> When asked what he had for breakfast, he said "Anything and everything." Immediate recall was good but he was unable to establish his own birth date.
>
> He said the President of the U.S. is Ronald Reagan. He was unable to mention any previous Presidents. He said the Mayor of Chicago now is Washington.
>
> When asked what is the Capitol of the U.S., he said "I don't know." When asked to name U.S. cities, he said "Chicago, New York and Illinois." When asked to subtract 7 from 100, he said "I don't know no more."
>
> When asked what he would do if there were a fire in a movie theatre, he said "I don't know what I would do." When asked what he would to if he found a stamped, addressed and sealed envelope, he said "I don't know." When asked about the difference between a river and a lake, he said "I don't know that either." When asked how oranges and apples are alike he said "They are not." He was unable to interpret proverbs.

(*Id.* at p. 3.)

On November 29, 1984 Judith Grace administered the Wide Range Achievement Test to Michael. [Motion Exhibit 10.] He was twelve years of age and he should have been in the Seventh Grade at the time. Michael was instead performing at the following grade levels: word recognition 3.0; Spelling 2.1; math 3.0, vocabulary 1.2 and comprehension 1.5

(*Id.*) The evaluator described Michael:

> Michael completed testing in one session. He scored many years below grade level in all areas. On the spelling he only spelled "cat" and "run" correctly. He made three errors on the coding section. On the Word section he only read "milk", "city," "in," and "tree," correctly. Michael seems to understand adding with regrouping although he made a computational error. He cannot subtract when regrouping is required. He does not seem able to multiply or divide.
>
> Michael was given the Gates-Level A, which is geared for first graders.

(*Id.*)

On February 6, 1985, Registered Psychologist Eileen Meyer, M.A. administered additional psychological testing to Michael. [Motion Exhibit 11.] Michael had a full scale performance IQ of 50. [*Id.* at p. 2.] On the same date he scored a 42 on the Peabody Picture Vocabulary Test which placed him in the lowest one percent of the population. [*Id.*]

Ultimately the Social Service Administration determined that Michael was eligible for Social Security as a result of his mental retardation which would have included a finding of below average intelligence. [Motion Exhibits 12 and 13.]

In September 1992, Dr. Winter, who was appointed by this Court, administered the Wechsler Adult Intelligence Scale (WAIS-R) to Michael Bies. He had a full scale IQ of 68 [Motion Exhibit 14].

Throughout his educational history, school officials placed Michael Bies in special education and therapeutic classes. [Motion Exhibits 7 and 14]. These placements were consistent with him having subaverage intelligence.

B. Michael Bies Suffers from Significant Limitations With Respect to his Adaptive Skills.

Adaptive behavior is the component of the mental retardation definition that requires that the intellectual impairment produce real-world disabling effects on the person's life.

The AAMR has divided adaptive skills into three areas or domains; 1) conceptual, 2) social, and 3) practical. For each of the three domains the AAMR has identified representative skills. (*Mental Retardation* (2002), p. 82.) It is sufficient for the definition of mental retardation that an individual suffers from significant limitations with respect to one of the three domains. [*Id.* at pp. 76].

Michael Bies suffers from significant limitations with respect to the conceptual domain He has deficient language and reading skills. At the age of twelve he had a vocabulary of 1.2 grade level. He had a vocabulary raw score of 17 and a scale score of 2 in 1985 [Motion Exhibit 9]. At trial Dr. Winters testified that Michael was functioning on the level of a third to sixth grader [Tr. 1117]. When the officer arrested Michael he could not even spell the name of the school that he attended [Defendant's Motion to Suppress, Exhibit 5, p. 2]. Michael's reading ability is even more impaired. At the age of twelve he was reading at the grade level of 1.5 [Motion Exhibit 10]. Three months later he was

reading on the level of a fourth grader [Motion Exhibit 11, p. 2]. He was functionally illiterate at the time of trial [Defendant's Sentence, Exhibit 3, page 6]. Michael was not able to read a two paragraph statement to the jury [Tr. 1088].

Michael also had subaverage adaptive skills in the social domain. Michael has few interpersonal skills. His mother described him as very difficult to control [Defendant's Sentencing Exhibit 3, p. 3]. Dr. Winters found him very compulsive [*Id.* at p. 4]. Dr. Feus concluded that Michael Bies "has had difficulty maintaining meaningful relationships. [Motion Exhibit 7, p. 4]. Dr. Winters reports that Michael is naïve as reflected in the account that he gives of events [Motion Exhibit 14, p. 2]. Michael has a long history of not following rules. His mother could not get him to follow rules within the family [Defendant's Sentencing Exhibit 3, p. 2]. He refused to attend school regularly and when he did attend he disrupted the class [*Id.* at p. 3]. Michael has repeatedly failed to comply with society's rules. He had a prior arrest for carrying a concealed weapon and at the time of his trial he had a pending charge of receiving stolen property. [*Id.* at p. 4].

Michael's adaptive skills are also impaired with respect to the practical domain. According to Dr. Winters Michael "has no employment history to speak of". [Defendant's Mitigation Exhibit 3, p. 4]. He has had a string of jobs, the longest lasted six months [Motion Exhibit 16, p. 3]. He does not maintain a safe environment. He is a constant threat to both himself and others around him. [Defendant's Sentencing, Exhibit 3, pp. 2, and 5,

Motion Exhibit 16, p. 3].

C. Michael Bies' Mental Retardation Originated Before The Age of Eighteen.

Michael Bies was diagnosed with mental retardation before the age of eighteen. [Motion Exhibits 10, 12, and 13]. His intelligence has been identified as subaverage before the age of eighteen. [Exhibits 12, and 13]. His behavior prior to the age of eighteen demonstrated that he had significant limitations on his adaptive skills. [Exhibits 7, 14, Mitigation Exhibit 3].

IV. THE STATE IS PRECLUDED FROM RELITIGATING THE FINDINGS OF ALL THE COURTS AND ITS OWN CONCESSIONS THAT MICHAEL BIES IS MENTALLY RETARDED.

This Court during the post-conviction process determined that Michael Bies is mentally retarded [Motion Exhibit 2,]. The Hamilton County Court of Appeals during the direct appeal found that Michael Bies is mentally retarded. *State v. Bies*, No. C-92-0841, 1994 Ohio App. LEXIS 1304 (Ham. Apps. March 30, 1994), [Motion Exhibit 1]. The Ohio Supreme Court likewise on direct appeal found that Michael Bies is mentally retarded. *State v. Bies*, 74 Ohio St. 3d 320, 327 (1996).

During the trial of this case, the Hamilton County Prosecutor did not dispute that Michael Bies is mentally retarded. The trial prosecutor told the jury that "Contrary to the closing argument by Mr. Deardorff, his IQ is not 63, it's 68. It's in the report if you'd like to see it. Michael Bies is not intelligent. I think that we can all accept that." [Tr. 1180].

During the post-conviction proceedings in the Hamilton County Court of Appeals and in the Ohio Supreme Court, the Hamilton County Prosecutor conceded Michael's mental retardation. [Motion Exhibits 3-5].

When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties even on a future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *United States v. Patterson*, 827 F.2d 184, 187 (7th Cir. 1987). The doctrine of collateral estoppal is part of the Double Jeopardy Clause of the Fifth Amendment. *Ashe v. Swenson*, 397 U.S. at 445. That doctrine precludes the prosecutor from relitigating the findings of the Hamilton County Court of Appeals and the Ohio Supreme Court that Michael Bies is mentally retarded.

IV. CONCLUSION

Wherefore pursuant to O.R.C. § 2953.21(D) and Ohio Civil Rule 56, the Court should enter a judgment that Michael Bies is mentally retarded. Such a finding is warranted by the prior findings of this Court, the Court of Appeals and the Ohio Supreme Court; the concessions of the Hamilton County Prosecutor's Office in all three courts, the conclusions of the experts appointed by this Court and the testimony of one of those experts in the mitigation phase.

Respectfully submitted,

/s/ S. Scott Haynes

S. Scott Haynes - 0059586
Hallowes, Allen & Haynes

1616 Brice Road
Reynoldsburg, Ohio 43068
(614) 868-0009
Fax (614) 868-0029

And

David H. Bodiker
Ohio Public Defender

Randall L. Porter – 005835
Assistant State Public Defender
Office of the Ohio Public Defender
8 E. Long St., 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax (614) 728-3670
COUNSEL FOR PETITIONER

(Certificate of Service omitted in printing)

STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

No. B-9205607
(Filed September 8, 2003)

STATE OF OHIO

Plaintiff-Respondent

v.

MICHAEL BIES

Defendant-Petitioner

MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

The State hereby opposes Bies' Motion for Summary Judgment. The reasons in support of this position are stated in the accompanying memorandum.

Respectfully submitted,

MICHAEL K ALLEN (0025214)
HAMILTON COUNTY
PROSECUTOR

Mark Piepmeier (0006894)
Assistant Prosecuting Attorney

/s/ James Michael Keeling
James Michael Keeling
(0068810)
Assistant Prosecuting Attorney
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202

(513) 946-3178
Fax (513) 946-3021
Counsel for Plaintiff,
State of Ohio

MEMORANDUM

On August 15, 2003, Bies filed a Motion For Summary Judgment concerning his third cause of action in his latest (third) post-conviction filing. While the filing does little more than rehash Bies' claims in his latest petition, the State will respond to two of the contentions raised in the motion.

I. Bies' Contention That the Record Permits Only a Finding of Mental Retardation

Bies argues that the record supports only his desired finding. Such a claim is specious.

In *State v. Lott* (2002), 97 Ohio St. 3d 303, the Ohio Supreme Court declared (at ¶ 10), "although *Atkins* barred the execution of the mentally retarded, it did not establish procedures for determining whether an individual is 'mentally retarded' for purposes of escaping execution." The court held (at ¶ 11) that "in the absence of statutory framework . . . Ohio courts should observe the following substantive standards and procedural guidelines in determining whether convicted defendants facing the death penalty are mentally retarded." The court stated that clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. *Id.* at fn. 3, citing definitions from the American Association of Mental Retardation and the

American Psychiatric Association. These definitions require (1) significantly sub-average intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18. Bies does not meet these guidelines and as such, he is not mentally retarded.

A. Bies Does Not Suffer from Significantly Sub-average Intelligence

In regard to the intellectual criterion for the diagnosis of mental retardation, mental retardation is generally thought to be present if an individual has an I.Q. test score of approximately 70 or below. As Bies points out, in 1985, Psychologist Eileen Meyer, M.A. concluded that he had an I.Q. of 50 [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia*, *State v. Lott*, and Ohio Revised Code section 2953.21, Exhibit 6], in 1992, Dr. Donna Winter concluded he had a full scale I.Q. of 68 [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia*, *State v. Lott*, and Ohio Revised Code section 2953.21, Exhibits 2 and 3], and in 1996, Dr. Kristen Haskin concluded he had an I.Q. of 72 [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia*, *State v. Lott*, and Ohio Revised Code section 2953.21, Exhibit 7]. It is clear that the Bies' I.Q. progressively became more and more normal and he only became increasingly intellectual. He does not have sub-average intelligence.

While I.Q. tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination of this issue.

As previously stated, in 1992 the year of the crime, Bies was found to have an I.Q. of 68. In light of the standard error of measurement, this score clearly places him within the range of a normal I.Q. score (which he later was found to have). Therefore, it is extremely critical to look at his adaptive behavior skills and functioning in society.

B. Bies Does Not Suffer from Significant Limitations with Respect to His Adaptive Behavior Skills.

Adaptive behavior is the collection of conceptual, social, and practical skills that people have learned so they can function in their every day lives. Significant limitations in adaptive behavior impact a person's daily life and affect the ability to respond to a particular situation or to the environment. Bies has no problems functioning and taking care of himself. In fact, this court found "that he is capable [and has] of living and functioning on his own." (See *Findings of Fact* page 4 of Defendant's First Post Conviction Petition).

Bies was married at the age of 18 and the couple lived together for approximately 3 years [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia*, *State v. Lott*, and Ohio Revised Code section 2953.21, Exhibit 9]. He has two children by his wife and a third child by another woman. Bies has held several jobs. He has worked as a private security guard, an undercover security person at a night club, and he has done construction work [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia*, *State v. Lott*, and Ohio Revised Code section 2953.21, Exhibits 2,3, and

9]. In Donna Winter's 1992 court report, she states that "[the defendant] goes about the community, unassisted. He carries out the activities of daily life fairly independently."

Bies is capable of personal activities of daily living such as eating, dressing, mobility and toileting. He is also capable of instrumental activities of daily living such as preparing meals, using the telephone, using transportation and doing housekeeping activities. In addition, he has been in relationships and even married once. He has fathered children. He has also held down several jobs. He is clearly able to take care of himself and has the skills necessary to function in society. Bies does not suffer from any limitations regarding his adaptive behavior skills.

C. Bies Is Capable of Functioning as a Normal Person and Did So Before the Age of Eighteen.

Bies' I.Q. score coupled with his adaptive behavior skills indicate that he is not mentally retarded. He has always been able to function normally in society; now and prior to the age of eighteen. The defendant's I.Q. and subsequent testing suggests developmental delays in certain areas, but do not indicate mental retardation, nor an inability to know the difference between right and wrong.

II. Bies' Contention That State Is Barred from Arguing Against His Claim of Mental Retardation

Bies asks that his claim of mental retardation be accepted as a previously proven fact and the State

be precluded from arguing against it. Such a claim flies in the face of the mandate of *Lott* and the record in this case.

In *Lott* the Ohio Supreme Court stated,

> Whether Lott is mentally retarded is a disputed factual issue, which we believe is best resolved in the trial court. The defense should have the opportunity to present additional evidence on Lott's mental retardation before a final decision is made. * * * We believe that these matters should be decided by the court and do not represent a jury question. In this regard, a trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency (i.e., the judge, not the jury, decides the issue).

Lott ¶ 9, 18

It clear from this ruling that neither party can claim the matter is a conclusive proven fact. Instead, this Court is to hold an evidentiary hearing, comparable to a ruling on competency, to once and for all determine Bies' mental retardation claim. Furthermore Bies bears the burden of proving he is mentally retarded by a preponderance of the evidence. *Lott* ¶ 21 There is presumption that a defendant is not retarded if his I.Q. score is above 70. *Lott* ¶ 12.

As earlier shown, there is substantial evidence to show Bies is not retarded.

III. CONCLUSION

The State opposes Bies' Motion for Summary Judgment.

Respectfully submitted,

MICHAEL K ALLEN (0025214)
HAMILTON COUNTY
PROSECUTOR

Mark Piepmeier (0006894)
Assistant Prosecuting Attorney

/s/ James Michael Keeling
James Michael Keeling
(0068810)
Assistant Prosecuting Attorney
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3178
Fax (513) 946-3021
Counsel for Plaintiff,
State of Ohio

(Certificate of Service omitted in printing)

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. B 925607
(Filed September 18, 2003

STATE OF OHIO
Plaintiff-Respondent

v.

MICHAEL BIES
Defendant-Petitioner

MICHAEL BIES' REPLY IN SUPPORT
OF HIS MOTION FOR SUMMARY JUDGMENT
AS TO THE THIRD CAUSE OF ACTION

I. INTRODUCTION

On August 15, 2003, Michael Bies filed his Motion for Summary Judgment ("Motion") concerning his mental retardation. In his Motion he cited to the prior findings by this Court, the Hamilton County Court of Appeal and the Ohio Supreme Court as well as the repeated concessions by the Hamilton County Prosecutor that Michael was mentally retarded. He also attached sixteen exhibits which documented that repeated findings of the state courts, the federal government and the mental health professionals that he was mentally retarded.

On September 8, 2003, the State filed its Memorandum in Opposition to Michael's Motion for Summary Judgment ("Memo Contra"). The State attached *no* exhibits or affidavits to support its pleading. The State did *not* contest the factual findings of this Court, Court of Appeals and the Ohio Supreme Court that Michael Bies was mentally

retarded. The State made *no* effort to explain its about face from its prior repeated concessions that Michael Bies was mentally retarded. The State *failed* to cite to any conclusions from any mental health expert that Michael Bies was not mentally retarded.

For the reasons delineated herein, the State's inability to contest any of the material facts contained in Michael's Motion should lead this Court to two simple conclusions. Michael Bies is mentally retarded. Michael Bies is entitled to summary judgment.

II. It is too late for the State to begin to contest Michael Bies' mental retardation.

This Court, the unanimous Hamilton County Court of Appeals and the unanimous Ohio Supreme Court found Michael Bies mentally retarded. As the State is fond of arguing, that makes the count eleven judges in favor of the proposition that Michael is mentally retarded, none against the proposition.

At trial the Hamilton County Prosecutor's Office did not contest Michael Bies' mental retardation. It did not call any experts to opine that he was mentally retarded. It conceded that this Court's expert was correct that Michael had an IQ of 68 (Tr. 1180). It did not contest the finding of this Court's own expert that Michael Bies was mildly mentally retarded [Summary Judgment Motion Exhibit 14, p. 6].

The State instead cited to *State v. Lott*, 97 Ohio St. 3d 303 (2002) and claims that all of the judicial findings and concessions by the Hamilton

County Prosecutor that Michael is mentally retarded are for naught [Memorandum Contra p. 5]. The State misconstrues *Lott*.

When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in a future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970); *United States v. Patterson*, 827 F.2d 184, 187 (7th Cir. 1987). The doctrine of collateral estoppel is part of the Double Jeopardy Clause of the Fifth Amendment. *Ashe v. Swenson*, 397 U.S. at 445. That doctrine precludes the prosecutor in the present case from relitigating the findings of the Hamilton County Court of Appeals and the Ohio Supreme Court that Michael Bies is mentally retarded.

The Ohio Supreme Court in *Lott* did not overrule the Fifth Amendment or *Ashe v. Swenson*. Thus to the extent the holding of *Lott* conflicts with *Ashe*, the Fifth Amendment and *Ashe* prevails. However the *Lott* decision, if properly read, does not conflict with *Ashe* or the Fifth Amendment. Michael Bies has IQ scores of 50, 68 and 72. Lott's IQ as described by the Ohio Supreme Court is much higher:

> Lott argues that he is mentally retarded and submits test results showing that he scored a 72 on an IQ test administered in August 1986. Lott argues that an IQ of 72 places him within the mentally retarded range of intellectual functioning since there is a five-point margin of error on any IQ test score. Additionally, Lott submits five affidavits from family and friends showing personality problems and behavioral indicators of early-life trauma.

> Other evidence tends to refute Lott's claim. Test results introduced during the mitigation phase of Lott's trial indicated that "Lott's intelligence quotient ranged in the low average categories, with 'I.Q.' tests yielding results of 77-81, 83-91, and 86-97." *State v. Lott*, 51 Ohio St. 3d at 172, 555 NE.2d 293. Moreover, the state has submitted a sixth grade IQ test showing that Lott's IQ was in a reported range of 87-97, and a 1984 test showing a full scale IQ of 86.

State v. Lott, 97 Ohio St. 3d at 304.

Lott's mental retardation was in dispute because he had one score in the mental retardation range and at least five scores outside the range of mental retardation. Michael Bies' scores are all within the range of mental retardation. Michael Bies' highest IQ score is the same as Lott's lowest IQ score. Michael's scores do not create a factual dispute in the present case. The State cannot cite to any IQ testing that provides it with a colorable basis for arguing that Michael Bies is not mentally retarded.

Michael Bies' claim is also distinguishable from Lott's claim because of the prosecutors' concessions and courts' findings that Michael is mentally retarded. In *Lott* the State never conceded his mental retardation and the appellate courts never found that he was mentally retarded. *State v. Lott*, No. 54537, 1989 Ohio App. LEXIS (Cuy. App. March 16, 1989) p. 110-115, [Reply Exhibit 1]; *State v. Lott*, 51 Ohio St. 3d 160, 172 (1990).

The State's reliance upon *Lott* is misplaced. The Court should enter summary judgment for Michael Bies.

III. Even if this Court ignores all of the prior judicial findings and the concessions of the Hamilton County Prosecutor that Michael Bies is mentally retarded, the fact remains that Michael Bies is mentally retarded.

The State correctly concedes that the definition of mental retardation contains three prongs [Memorandum Contra p. 2]. It also correctly identifies those three prongs [*Id.*].

However for the reasons contained herein the State improperly asserts that Michael fails to meet those three prongs.

A. Michael does not have a "normal" IQ and cannot be considered "intellectual" by any stretch of the imagination.

The State summarizes the information concerning Michael's IQ as follows:

> As Bies points out, in 1985, Psychologist Eileen Meyer, M.A. concluded that he had an I.Q. of 50 [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia, State v. Lott*, and Ohio Revised Code section 2953, Exhibit 6], in 1992, Dr. Donna Winter concluded he had a full scale I.Q. of 68 [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia, State v. Lott*, and Ohio Revised Code section 2953.21, Exhibits 2 and 3], and in 1996, Dr. Kristen Haskin concluded he had an I.Q. of 72 [see Petitioner's Mental Retardation Petition Pursuant to *Atkins v. Virginia, State v. Lott* and Ohio Revised Code section 2953.21, Exhibit 7].

[Memorandum Contra p. 3].

Michael in his Motion, however cited to yet other data that support this conclusion that he is mentally retarded including testing conducted by Consulting Examinations, Inc. on April 8, 1983 [Summary Judgment Exhibit 9], testing conducted by Judith Grace on November 29, 1984 [Summary Judgment Exhibit 10] and the findings of the Social Security Administration in 1983 and 1984 that he was mentally retarded. [Summary Judgment Exhibits 12 and 13].

The State after surveying all of the testing incredibly argues "It is clear that Bies' IQ progressively became more and more normal and he became increasingly intellectual. He does not have sub-average intelligence." [Memorandum Contra p. 3]. (Emphasis added.) Michael's highest IQ score is 72. The Supreme Court in *Atkins* noted that "an IQ between 70 and 75" is "typically considered the cutoff score for the intellectual functioning prong of the mental retardation definition." 536 U.S. ate 309 n.5. None of his scores support the conclusion that Michael is of "normal intelligence" or is an "intellectual".

B. Michael does suffer from significant limitations with respect to his adaptive skills.

The State cites to the fact that Michael was married and fathered two children [Memorandum Contra p. 4]. Neither "activity" requires any level of intelligence. He did not support either his wife or children. He was not able to meaningful interact with his wife. As Dr. Feuss, another expert appointed by the Court opined, Michael "has had difficulty maintaining meaningful relationships". [Motion Exhibit 14, p. 4].

Next the State contends that Michael was able

to maintain a job, "He has worked as a private security guard, an undercover security person and he has done construction work." [Memorandum Contra p. 4]. What few jobs Michael has held have been for only brief periods of time. As Dr. Winter concluded, Michael Bies has demonstrated "a basic failure to succeed in any part of his life, i.e. school, vocation..." [Summary Judgment Reply, Exhibit 2, p. 7]. She further concluded that Michael "has no employment history to speak of"[Summary Judgment Reply, Exhibit 2, p. 4]. His longest job lasted six months [Summary Judgment Motion Exhibit 16, p. 3]. Michael's repeated failures to maintain any gainful employment do not reflect adaptive skills.

The State concludes its argument concerning Michael's adaptive skills by claiming:

> Bies is capable of personal activities of daily living such as eating, dressing, mobility and toileting. He is also capable of instrumental activities of daily living such as preparing meals, using the telephone, using transportation and doing housekeeping activities. In addition, he has been in relationships and even married once. He has fathered children. He has also held down several jobs. He is clearly able to take care of himself and has the skills necessary to function in society. Bies does not suffer from any limitations regarding his adaptive behavior skills.

[Memorandum Contra, p. 4]. The State makes no citation to the record to support the facts upon which its argument is premised. Unsupported allegations do not make adaptive skills. Michael's marginal functioning in society simply refutes these unfounded assertions.

In his Motion for Summary Judgment Michael documented that he had severe limitations with respect to the conceptual domain including language and reading skills:

> Michael Bies suffers from significant limitations with respect to the conceptual domain. He has deficient language and reading skills. At the age of twelve he had a vocabulary of 1.2 grade level. He had a vocabulary raw score of 17 and a scale Score of 2 in 1985 [Motion Exhibit 9]. At trial Dr. Winters testified that Michael was functioning on the level of a third to sixth grader [Tr. 1117]. When the officer arrested Michael he could not even spell the name of the school that he attended [Defendant's Motion to Suppress, Exhibit 5, p. 2]. Michael's reading ability is even more impaired. At the age of twelve he was reading at the grade level of 1.5 [Motion Exhibit 10]. Three months later he was reading on the level of a fourth grader [Motion Exhibit 11, p.] He was functionally illiterate at the time of trial [Defendant's Sentencing, Exhibit 3, page 6]. Michael was not able to read a two paragraph statement to the jury [Tr. 1088].

[Motion, pp. 10-11].

The State offered no argument or evidence to dispute that Michael lacks even the most basic reading and language skills. This concession by the State as to this one area is sufficient for the Court to find that Michael has impaired adaptive skills. *Mental Retardation's Definition Classification and System of Support I* (Ruth Luekessons, 10th ed. 2002) p. 76.

C. Michael Bies' mental retardation originated before the age of eighteen.

The State contends that Michael "has always been able to function normally in society; now and prior to the age of eighteen." [Memorandum Contra p. 5]. Michael's lengthy documented history of placements in special education classes and mental institutions contradict the State's unsupported assertion.

IV. Conclusion: The State should not execute Michael Bies who is mentally retarded.

Ohio Civ. R. 56(E) states in pertinent part that, "When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is no genuine issue for trial. *If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.*" (Emphasis added). The State attached *no* exhibits or affidavits to support its pleading. The State did *not* contest the factual findings of this Court, Court of Appeals and the Ohio Supreme Court that Michael Bies was mentally retarded. The State made *no* effort to explain its about face from its prior repeated concessions that Michael Bies was mentally retarded. The State *failed* to cite to any conclusions from any mental health expert that Michael Bies was not mentally retarded.

At the time of the *Atkins* decision, former Ohio Attorney General Betty Montgomery stated publicly that she agreed with the Supreme Court decision, "The State should not be in the business of executing

the mentally retarded." [Reply Exhibits 3 and 4.]

The evidence identified herein, including the reports of the experts and various agencies dictates the conclusion that Michael is mentally retarded. Therefore, the state cannot, consistent with the Eighth and Fourteenth Amendments, execute Michael. The anecdotal evidence in Michael's case speaks strongly as to his impaired intellectual processes: 1) Michael could not spell the name of his high school when arrested; 2) he thought the theft charge in the State of Indiana was more important than the aggravated murder charge in the State of Ohio; 3) he could not tell the psychologist in what stage his trial was; 4) he could not read in the sentencing phase a two paragraph statement to the jury; and 5) after trial he was worried more about paying his court appointed attorneys than his death sentence.

The former Ohio Attorney General is correct; the state should not be in the business of executing the mentally retarded. For that very reason this Court should grant Summary Judgment for Michael and vacate Michael's death sentence.

Respectfully submitted,

/s/ S. Scott Haynes
S. Scott Haynes - 0059586
Hallowes, Allen & Haynes
1616 Brice Road
Reynoldsburg, Ohio 43068
(614) 868-0009
Fax (614) 868-0029

And

David H. Bodiker

Ohio Public Defender
Randall L. Porter - 005835
Assistant State Public Defender
Office of the Ohio Public Defender
8 E. Long St., 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
Fax (614) 728-3670
COUNSEL FOR PETITIONER

(Certificate of Service omitted in printing)

PETITIONER'S BRIEF

120

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No. 08-598

In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

MICHAEL BIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bmizer@ag.state.oh.us

Counsel for Petitioner
David Bobby, Warden

BOTH 4CI251

CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of "acquittal" that conflicts with this Court's decisions?

2. Do the Double Jeopardy Clause's protections apply to a state post-conviction hearing on the question of a death-sentenced inmate's mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), that does not expose the inmate to the risk of any additional criminal punishment?

3. Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause's collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate's mental retardation under *Atkins* even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

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The Sixth Circuit's opinion, *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008), is reproduced at Pet. App. 33a-66a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc, *Bies v. Bagley*, 535 F.3d 520 (6th Cir. 2008), is reproduced at Pet. App. 1a-32a. The United States District Court for the Southern District of Ohio's order is reproduced at Pet. App. 67a-68a. The state post-conviction court's opinion and orders, denying the petition for post-conviction relief, are reproduced at Pet. App. 95a-105a. The Ohio Supreme Court's opinion in *State v. Bies*, 658 N.E.2d 754 (Ohio 1996), affirming Bies's conviction and sentence, is reproduced at Pet. App. 106a-128a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the Warden's rehearing petition on August 5, 2008. The Warden timely filed a petition for a writ of certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the Warden's petition on January 16, 2009. *Bobby v. Bies*, 77 U.S.L.W. 3412 (U.S. Jan. 16, 2009) (No. 08-598).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The State of Ohio in this case simply seeks to put Respondent Michael Bies to his proof on the claim that his death sentence is invalid under *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is mentally retarded. Relying on the collateral estoppel component of the Double Jeopardy Clause, the Sixth Circuit held that Bies's *Atkins* claim was decided once and for all in 1996, when the Ohio Supreme Court, in affirming Bies's conviction and death sentence, observed that Bies's "mild to borderline mental retardation merit[ed] some weight in mitigation." But the Ohio Supreme Court could not have decided the *Atkins* claim six years before *Atkins* was even issued. More to the point, the Double Jeopardy Clause affords Bies no refuge because he has never been "acquitted" of the death penalty, nor is he being "twice put in jeopardy" by a second prosecution or punishment. The Court therefore should reverse the Sixth Circuit's decision and afford the Ohio courts their first chance to adjudicate Bies's mental-retardation claim under the *Atkins* standard.

STATEMENT OF THE CASE

A. Bies was convicted and sentenced to death for the murder and attempted rape of a ten-year-old boy.

On the morning of May 12, 1992, police discovered the body of ten-year-old Aaron Raines in the basement of an abandoned building in Cincinnati. Pet. App. 106a. The autopsy showed that Raines suffered multiple blunt injuries to his head, neck, chest, and abdomen. Pet. App. 109a. He

had nineteen separate lacerations to his scalp, five broken ribs, and a collapsed lung, and the left side of his face was flattened because of severe skull fractures. Pet. App. 108a-109a. Raines's injuries suggested that he had been severely beaten with a piece of concrete and a metal pipe, strangled with a piece of twine, and kicked. Pet. App. 107a-108a.

A nine-week police investigation implicated Bies and an accomplice, Darryl Gumm, in the murder. Pet. App. 109a. The evidence showed that the two men lured the boy into the abandoned building with the intent to rape him. Pet. App. 107a. When Raines resisted, they beat him, deposited his body in the basement, and left the area. Pet. App. 107a-108a. Bies eventually admitted his involvement in the crime. Pet. App. 110a.

A jury convicted Bies of aggravated murder, attempted rape, and kidnapping, as well as three death-penalty specifications. Pet. App. 110a. During the penalty phase, as mitigating evidence, Bies presented the testimony of a clinical psychologist, Donna E. Winter. J.A. 9-58. The Ohio Supreme Court summarized her testimony as follows:

> Winter reviewed an evaluation made of Bies when he was three years old, in which he was characterized as being "violent and uncontrollable." Hospital records of Bies indicated that he was abused during his childhood, and that his upbringing was chaotic, neglectful and violent. Between the ages of five and thirteen, Bies had made several suicide attempts or threats. Bies was too disruptive for public school, so he

> was placed in several different special schools. Winter believes that Bies is still a very impulsive person, who at times cannot control his anger and becomes hostile. Winter evaluated Bies's I.Q. as being in the range of mildly to borderline mentally retarded. Although Winter described Bies as a "very dense individual" lacking common sense, she conceded that everyone who evaluated Bies, including herself, concluded that Bies knew right from wrong at the time of the murder.

Pet. App. 110a-111a. The jury recommended a sentence of death, which the trial court imposed. Pet. App. 111a. The Ohio court of appeals affirmed the conviction and sentence. J.A. 84.

B. The Ohio Supreme Court affirmed Bies's conviction and sentence on direct review.

On Bies's direct appeal as of right, the Ohio Supreme Court conducted an independent review of Bies's death sentence for appropriateness and proportionality under Ohio Rev. Code § 2929.05. Citing Winter's trial testimony, the court stated that "Bies's personality disorder and mild to borderline mental retardation merit[ed] some weight" under the catch-all mitigating provision of the Ohio sentencing law. Pet. App. 120a (citing Ohio Rev. Code § 2929.04(B)(7) (LexisNexis 1996)). It also gave "some weight" in mitigation to "Bies's lack of a significant criminal record" and his "violent and unstable family environment." *Id.* Nevertheless, the court concluded that the aggravating circumstances, including the heinous and brutal nature of the crime,

"outweigh[ed] the mitigating factors beyond a reasonable doubt," "merit[ing] the capital penalty." Pet. App. 121a. The court affirmed the death sentence, and this Court denied review. *Bies v. Ohio*, 517 U.S. 1238 (1996).

C. The state courts rejected Bies's petitions for post-conviction relief.

Bies filed his first petition for post-conviction relief in the state court of common pleas, arguing, among other things, that the Eighth Amendment's cruel and unusual punishment clause barred his execution because he is mentally retarded. The court rejected the claim on its merits. J.A. 153. The Ohio court of appeals affirmed, concluding that Bies had waived his Eighth Amendment claim by not raising it on direct appeal. J.A. 176. The Ohio Supreme Court dismissed the appeal without a decision. See *State v. Bies*, 719 N.E.2d 4 (Ohio 1999). Bies then filed a second state post-conviction petition, which the state courts again denied. See *State v. Bies*, No. C-020306, 2003 Ohio App. Lexis 459 (Ohio Ct. App. Jan. 31, 2003); *State v. Bies*, 788 N.E.2d 648 (Ohio 2003).

While his second petition for state post-conviction relief was pending, Bies filed a parallel action in federal district court, seeking habeas relief on the ground, among others, that he is ineligible for the death penalty because he is mentally retarded. Shortly after he filed that petition, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). In light of *Atkins*, the federal court stayed Bies's habeas proceeding and directed him to exhaust his mental-retardation claim by filing a third petition for post-conviction relief in the Ohio courts. Pet. App. 83a.

Bies complied and moved for summary judgment in the state court of common pleas, arguing that the trial record affirmatively established the fact of his mental retardation, that the Ohio Supreme Court recognized his mental retardation on direct appeal, and that double jeopardy precluded the State from taking a contrary position. Pet. App. 95a-104a.

The court of common pleas denied summary judgment, finding that a factual dispute existed in the record as to Bies's IQ score, and that the Ohio Supreme Court had not, for *Atkins* purposes, conclusively determined the issue of mental retardation in its earlier opinion: "Because the issues were not identified and the analysis of *Lott* and *Atkins* had not yet been established by the Courts, the Court does not find that the State is precluded from arguing that Mr. Bies is not mentally retarded." Pet. App. 104a. The state court ordered a full hearing on the *Atkins* claim.

Bies filed a renewed motion for summary judgment, reiterating that a hearing on the issue of his mental retardation would violate his double-jeopardy rights. The court denied the motion, referencing its prior decision and stating that "the double jeopardy clause does not require summary judgment." Pet. App. 95a.

D. The federal courts granted habeas relief on Bies's double-jeopardy claim.

After the state post-conviction court denied his summary judgment motion, Bies returned to federal district court and restarted his habeas proceedings on his double-jeopardy theory. The magistrate judge found that Bies's *Atkins* claim remained

unexhausted because the state court was moving forward with a hearing on the claim. Pet. App. 83a. But the magistrate judge concluded that Bies had exhausted his argument under the Double Jeopardy Clause, and the judge found that the Clause's collateral estoppel component prevented the State from relitigating the issue of Bies's mental retardation in the state post-conviction proceedings. Pet. App. 84a-93a. The magistrate judge accordingly recommended that the habeas writ issue, Pet. App. 93a, and the district court agreed, Pet. App. 67a-68a.

On appeal, the Sixth Circuit affirmed the grant of the writ. The panel first held that the collateral estoppel component of the Double Jeopardy Clause applies to the penalty phase of a capital trial whenever "a judge or jury enters findings sufficient to establish a legal entitlement to a life sentence." Pet. App. 45a (internal quotations, citation, and alteration omitted). The panel then held that the Ohio Supreme Court actually and necessarily decided the factual issue of Bies's mental retardation on direct appeal in 1996 using the standards that it would adopt six years later in the wake of *Atkins*. Pet. App. 47a-57a. And that finding, the Sixth Circuit reasoned, entitled Bies to a life sentence under *Atkins*. Finally, the court concluded that the State was collaterally estopped from challenging the fact of Bies's retardation because the State had a full and fair opportunity to litigate the issue on direct appeal. Pet. App. 58a-59a.

The State sought panel rehearing or rehearing en banc, which the court denied over Judge Sutton's dissent. Pet. App. 1a-2a. Judge Sutton concluded that the Double Jeopardy Clause does not apply to

Bies for two reasons: (1) Bies had never received an "acquittal" (instead, the state courts had affirmed his sentence of death); and (2) the state post-conviction proceedings did not "twice put [Bies] in jeopardy." Pet. App. 22a-23a. Judge Sutton further objected to the panel's collateral estoppel analysis. He noted that the Ohio Supreme Court did not actually decide the issue of Bies's mental retardation under *Atkins* because that court examined the claim only through the lens of a mitigation analysis, and the two evaluations "flow from different constitutional requirements under the Eighth Amendment." Pet. App. 26a-27a. Finally, Judge Sutton explained that the issue of Bies's mental retardation, "[f]ar from being necessary" to the Ohio Supreme Court's decision affirming the death sentence, actually "cut against it"—making any findings by the Ohio Supreme Court "quintessentially the kinds of rulings not eligible for issue-preclusion treatment." Pet. App. 27a.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause provides that "[n]o person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend V. "[B]y its terms," the Clause "applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). The same principle holds true in the capital sentencing context, where "an 'acquittal' at a trial-like sentencing phase . . . is required to give rise to double-jeopardy protections." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 107 (2003).

The Sixth Circuit held that Bies is entitled to the writ because he was "acquitted" when the Ohio Supreme Court stated on direct review that his "mild to borderline mental retardation merit[ed] some weight in mitigation." But a defendant is "acquitted" of the death penalty only when the sentencer finds that the government has failed to prove its case that capital punishment is appropriate. See *Poland v. Arizona*, 476 U.S. 147, 155 (1986). By that settled standard, Bies was never acquitted, because the sentencing jury and every reviewing Ohio court found beyond a reasonable doubt that his death sentence was warranted. Bies cannot claim he was acquitted when he *lost* at every step along the way.

The Sixth Circuit also reasoned that the Double Jeopardy Clause's collateral estoppel component precludes the State from contesting Bies's mental retardation because that issue was already decided in his favor. See *Ashe v. Swenson*, 397 U.S. 436 (1970). But the criminal collateral estoppel rule does not apply without an earlier "acquittal." The Sixth Circuit's holding to the contrary untethers the *Ashe* doctrine from its constitutional text, conflicts with this Court's case law, and upsets well-established issue-preclusion principles.

The text of the Double Jeopardy Clause presents an additional obstacle to Bies's case. The Clause protects only those persons who are "twice put in jeopardy"—that is, those persons whom the State attempts to prosecute or punish a second time. But the state post-conviction proceeding at issue here is civil, not criminal, and it was initiated by Bies, not the State.

Even if the Double Jeopardy Clause or its collateral estoppel component applies here, the Sixth Circuit erred in its issue-preclusion analysis. For one thing, any finding by the Ohio Supreme Court as to Bies's mental retardation was not necessary to the court's decision, because it made no difference to his sentence. And findings that do not affect the outcome are, by definition, not essential to the judgment. Moreover, this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), changed the way Ohio courts treat mental-retardation evidence in capital cases. That change makes clear that the Ohio Supreme Court did not actually decide the *Atkins* issue before it became an issue, nor did the State have a full and fair opportunity to litigate it.

The Sixth Circuit's decision not only contravenes well-worn rules of double jeopardy and issue preclusion; it also flouts the principles of federalism and comity that inhere in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214. *Atkins* specifically left it to the States to administer mental-retardation claims in capital cases. But the Sixth Circuit thwarted the Ohio courts' first opportunity to implement that directive in Bies's case. What is more, the Sixth Circuit overrode the state post-conviction court's reasonable determination that no *Atkins* finding had yet been made. Comity and AEDPA do not permit such an intrusive result.

ARGUMENT

A. Bies received no death penalty "acquittal" that triggered either the Double Jeopardy Clause or its collateral estoppel component.

Even though every level of the Ohio courts affirmed Bies's death sentence, the Sixth Circuit held that Bies enjoys the Double Jeopardy Clause's protection based on two novel theories: (1) Bies was "acquitted" when the Ohio Supreme Court, in affirming his death sentence, stated that he exhibited "mild to borderline mental retardation"; and (2) the criminal collateral estoppel principle announced in *Ashe v. Swenson*, 397 U.S. 436 (1970), prevents the State from contesting Bies's mental retardation. Both holdings depart from this Court's well-established precedent.

1. Bies has not been "acquitted" of the death penalty.

The Sixth Circuit's innovative redefinition of "acquittal" ignores the long-settled meaning and importance of the term. See *United States v. Ball*, 163 U.S. 662, 671 (1896). "[T]he law attaches particular significance to an acquittal," *United States v. Scott*, 437 U.S. 82, 91 (1978), because "[i]t is acquittal that prevents retrial" under the Double Jeopardy Clause, *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980); see also *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (incorporating the Double Jeopardy Clause against the States). An "acquittal" is commonly understood as "a deliverance or setting free a person from a charge of guilt." *Black's Law Dictionary* 25 (6th ed. 1990).

In the capital-sentencing context, too, "the touchstone for double-jeopardy protection . . . is whether there has been an 'acquittal.'" *Sattazahn*, 537 U.S. at 109. An "acquittal" occurs in this context if "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (alteration and internal quotation marks omitted). In other words, when the jury rejects the prosecution's case for a death sentence, that sentencing judgment "amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); accord *Bullington v. Missouri*, 451 U.S. 430, 446 (1981); *United States v. Peoples*, 360 F.3d 892, 895 (8th Cir. 2004) ("[T]here must be an affirmative choice by the jury not to impose a death sentence.").

Bies has not been "acquitted" of the death penalty in any sense of the word. The State of Ohio persuaded the jury, beyond a reasonable doubt, that Bies committed first-degree murder plus three capital specifications. Pet. App. 110a. The jury then found beyond a reasonable doubt that the death penalty was warranted because the aggravating circumstances outweighed the mitigating circumstances. Pet. App. 111a. The Ohio courts affirmed the jury's findings and Bies's sentence on direct review. The Ohio Supreme Court specifically found, "beyond a reasonable doubt, that Bies committed the aggravating circumstances," Pet. App. 118a, and that "the aggravating circumstances outweigh[ed] the mitigating factors," Pet. App. 120a-121a.

Despite these unanimous outcomes in the State's favor, the Sixth Circuit found that an "acquittal" occurred based on a new definition of the term. The Sixth Circuit believed that "acquittal" "should not be read to mean that the defendant emerges victorious" from trial. Pet. App. 45a n.5. Instead, the court said, an "acquittal" occurs in a capital sentencing proceeding "when a judge or jury 'enter[s] findings sufficient to establish legal entitlement to the life sentence.'" Pet. App. 45a (quoting *Sattazahn*, 537 U.S. at 109). The appeals court then held that Bies was "acquitted" when the Ohio Supreme Court noted that he suffered "mild to borderline mental retardation," because that statement rendered him "constitutionally ineligible for the death penalty" under *Atkins*. Pet. App. 50a n.6.

The Sixth Circuit's redefinition of "acquittal" to include losses by criminal defendants defies common sense and settled case law—including the chief case the court cited for support. The Sixth Circuit leaned heavily on *Sattazahn*'s reference to "findings sufficient to establish legal entitlement to the life sentence." 537 U.S. at 108, *cited in* Pet. App. 45a. But in the same breath, *Sattazahn* explained exactly what it meant by that phrase: "*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." 537 U.S. at 108. Thus, *Sattazahn* merely confirmed that the Clause protects a capital defendant from resentencing only if the sentencer has found that the death penalty should not apply to him.

The defendant in *Sattazahn* was convicted of first-degree murder, but when the jury could not agree unanimously on whether to impose a death sentence, the trial court, consistent with state law, entered a default life sentence. *Id.* at 104-05. The state appellate court reversed the conviction because of a faulty jury instruction, and on retrial the jury again convicted the defendant of first-degree murder, but elected to impose a death sentence. *Id.* at 105.

This Court held that the Double Jeopardy Clause did not prevent Pennsylvania from seeking a death sentence on retrial because the defendant had not been "acquitted" of the death penalty. For "acquittal" purposes, the Court asked whether the defendant's "first life sentence was . . . based on findings . . . that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Id.* at 108; accord *id.* at 117 (O'Connor, J., concurring) (asking whether "the prosecution failed to prove its case for the death penalty"). The defendant was not acquitted at the first trial, the Court held, because neither the jury nor the judge entered "findings with respect to the alleged aggravating circumstance." *Id.* at 109.

Sattazahn's reasoning applies with even greater force here. Unlike in *Sattazahn*, where the initial sentencer made no findings either way, Bies's jury (and reviewing courts) expressly found that the State *had* met its burden in proving that the aggravating factors outweighed the mitigating circumstances beyond a reasonable doubt.

The Sixth Circuit's expansive definition of "acquittal" also runs contrary to *Poland* and *Rumsey*, the principal cases on which *Sattazahn* rested. In

Poland, the trial court imposed death sentences on both defendants after finding one aggravating factor (that their crime was especially heinous, cruel, or depraved) but not another (that they expected pecuniary value from the murder). 476 U.S. at 149. On appeal, the Arizona Supreme Court reversed, finding error not only in the guilt phase but also in the penalty phase, on both aggravating-factor determinations. *Id.* at 150. After the defendants were again convicted on retrial, the State introduced additional evidence during the penalty phase supporting the two original aggravating factors as well as a third aggravating circumstance (previous conviction of a violent felony). *Id.* The trial judge found all three aggravating circumstances and reimposed death sentences, and the Arizona Supreme Court affirmed. *Id.* at 150-51.

This Court rejected the *Poland* defendants' argument that the Double Jeopardy Clause precluded Arizona from seeking the death penalty on retrial because they had been "acquitted" of each aggravating factor presented at the first trial. *Id.* at 155. The Court refused to characterize the penalty-phase proceeding as "a set of minitrials on the existence of each aggravating circumstance," and instead explained that "the proper inquiry" for "acquittal" purposes "is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' *that the death penalty is appropriate*." *Id.* at 155-56 (internal citation omitted). "Plainly," the Court said, "the sentencing judge did not acquit, for he imposed the death penalty." *Id.* at 154. Because the Arizona courts "did not find the evidence legally insufficient to justify imposition of the death penalty," the *Poland*

defendants had not been "acquitted" at their first trial, and the slate had been wiped clean for purposes of a new sentencing hearing on retrial. *Id.* at 157.

Rumsey is the reverse side of the same coin. The state trial court imposed a life sentence on the capital defendant after it "entered findings denying the existence of each of the seven statutory aggravating circumstances." 467 U.S. at 211. When the Arizona Supreme Court found error and remanded for a new sentencing proceeding, the trial court imposed a death sentence. *Id.* at 207-08. This Court found a double-jeopardy violation because the trial court's earlier judgment was based on an explicit finding that the State had not proven the existence of any aggravating circumstances. In other words, the trial court had affirmatively ruled on "the central issue in the proceeding—whether death was the appropriate punishment for [the defendant's] offense." *Id.* at 211. Because the trial court's ruling that death was not an appropriate punishment "amount[ed] to an acquittal on the merits," the Double Jeopardy Clause "bar[red] any retrial of the appropriateness of the death penalty." *Id.*

This case falls squarely outside the "acquittal" box drawn in *Rumsey*, *Poland*, and *Sattazahn*. Bies faced only one sentencing proceeding, where the jury unanimously agreed that his case warranted the death penalty, and the state courts uniformly affirmed that sentence of death. The Sixth Circuit had no basis for its "odd and unacceptable result"—finding an "acquittal" even though "the State ha[d] 'proved its case.'" *Poland*, 476 U.S. at 157.

2. The collateral estoppel principle announced in *Ashe* applies only when a defendant has been "acquitted" within the meaning of the Double Jeopardy Clause.

In addition to its mistaken belief that Bies was acquitted in a way that triggered a double-jeopardy bar, the Sixth Circuit based its grant of the writ on a second theory: that the collateral estoppel component of the Double Jeopardy Clause announced in *Ashe* applies in Bies's favor. Pet. App. 45a; see also Pet. App. 4a-5a (Clay, J., concurring in the denial of rehearing en banc) (describing the "two separate double jeopardy doctrines"—*Ashe*'s collateral estoppel component and *Sattazahn*'s acquittal principle—on which the panel opinion relied). As shown above, Bies has never been acquitted of the death penalty. For Bies to benefit from *Ashe*'s collateral estoppel component, then, that doctrine must apply even without an acquittal. But "the considerations of double jeopardy protection" are "implicit in the application of collateral estoppel" under *Ashe*. *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984). Thus, an "acquittal" is required under *Ashe* no less than in a routine double-jeopardy case.

Ashe firmly rooted its collateral estoppel reasoning in the Double Jeopardy Clause and underscored the significance of a prior acquittal. In answering the question "whether collateral estoppel . . . is a part of the Fifth Amendment's guarantee against double jeopardy," 397 U.S. at 442-43, the *Ashe* Court started with two leading cases: (1) Justice Holmes's opinion in *United States v. Oppenheimer*, 242 U.S. 85, 88 (1916), which

established that "when a man once has been acquitted on the merits," the Fifth Amendment does not allow "the Government to prosecute him a second time"; and (2) Judge Friendly's opinion in *United States v. Kramer*, 289 F.2d 909, 915 (2d Cir. 1961), which similarly held that "[a] defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this." Both *Oppenheimer* and *Kramer* premised their collateral estoppel reasoning on earlier *acquittals*. And for good reason: As Judge Friendly explained, "to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct . . . would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment." *Kramer*, 289 F.2d at 916.

Ashe therefore rooted the criminal collateral estoppel rule in the protections that had long attached to prior acquittals, and it made clear that the rule "is embodied in the Fifth Amendment guarantee against double jeopardy": "For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 445-46 (internal citations omitted). The Court also explained that "the rule of collateral estoppel in criminal cases" should be applied "with realism and rationality" to determine whether "a *previous judgment of acquittal*" foreclosed relitigation of an issue in a later proceeding. *Id.* at 444 (emphasis added). All the while, the Court emphasized that it was talking about cases "where the first judgment was based on a general verdict of acquittal." *Id.*; see

also *id.* at 459 n.13 (Brennan, J., concurring) ("[O]f course, collateral estoppel would not prevent multiple prosecutions when the first trial ends in a verdict of guilty."). In fact, the *Ashe* Court's statement of the rule itself depends on the presence of an acquittal: It bars relitigation of an issue resolved in a defendant's favor by a "valid and final judgment," *id.* at 443, and "[a] 'final judgment' in favor of a criminal defendant is an acquittal." *United States v. Merlino*, 310 F.3d 137, 142 (3d Cir. 2002).

Routine collateral estoppel principles also dictated the necessity of the acquittal in *Ashe*. Under those principles, discussed more fully in Part C below, a factual determination has preclusive effect only if it was "necessary to support the judgment entered in the first action." 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4421, p. 536 (2d ed. 2002). A factual determination is necessary (or "essential") to the first judgment when a different factual resolution would have yielded a different outcome. See Restatement (Second) of Judgments § 27 cmts. h-j (1982) ("Restatement"). That requirement was satisfied in *Ashe*: The Court looked to the jury's "general verdict of acquittal" to determine whether the jury resolved in the defendant's favor "[t]he single rationally conceivable issue in dispute"—"whether the [defendant] had been one of the robbers. And the jury by its verdict found that he had not." 397 U.S. at 444-45. Because that factual determination was essential to the outcome in the first trial, it carried preclusive effect. See Restatement at § 27 cmt. j, reporter's note (citing *Ashe* as illustration of determinations essential to judgment). Collateral

estoppel applied in *Ashe*, in other words, because the jury acquitted.

This Court's later decisions applying *Ashe* confirm that the doctrine depends on an earlier acquittal. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court observed that "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." *Id.* at 705 (citing *Ashe*). Likewise, in *Brown v. Ohio*, 432 U.S. 161 (1977), the Court commented that the Double Jeopardy Clause's finality policy "protects the accused from attempts to relitigate the facts underlying *a prior acquittal*." *Id.* at 165 (citing *Ashe*) (emphasis added). Consistent with that understanding, the Court in both *Turner v. Arkansas*, 407 U.S. 366, 370-71 (1972) (per curiam), and *Dowling v. United States*, 493 U.S. 342, 348 (1990), assessed whether the defendants' earlier verdicts of acquittal determined an ultimate issue in their successive prosecutions.

The federal courts of appeals have similarly understood that *Ashe*'s collateral estoppel rule depends on an earlier acquittal. The Fifth Circuit, for instance, has held "that collateral estoppel ordinarily does not apply when the offense on retrial is the same offense on which the defendant was convicted in the first trial," because "[t]he underlying purpose of collateral estoppel is to 'protect a man who has been *acquitted* from having to "run the gauntlet" a second time.'" *United States v. Price*, 750 F.2d 363, 366 (5th Cir. 1985) (quoting *Ashe*). Other circuits agree. See *Merlino*, 310 F.3d at 142 (3d

Cir.); *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1242 (10th Cir. 1998); *United States v. Lanoue*, 137 F.3d 656, 662 (1st Cir. 1998); *United States v. James*, 109 F.3d 597, 600 (9th Cir. 1997); *United States v. Boney*, 977 F.2d 624, 646 (D.C. Cir. 1992); *United States v. Bailin*, 977 F.2d 270, 277-78 (7th Cir. 1992); *Tucker v. Kemp*, 762 F.2d 1480, 1487 (11th Cir. 1985); *United States v. Nash*, 447 F.2d 1382, 1384 (4th Cir. 1971). For its part, the Eighth Circuit has offered inconsistent interpretations. Compare *United States v. Mitchell*, 476 F.3d 539, 544 (8th Cir. 2007) ("The Supreme Court has incorporated the doctrine of issue preclusion, or collateral estoppel, into the Double Jeopardy Clause, applying it not only to acquittals, but also to final adjudications of fully litigated legal issues."), with *Flittie v. Solem*, 775 F.2d 933, 939 (8th Cir. 1985) (en banc) (agreeing with the panel's conclusion that "the *Ashe* rule refers only to acquittals").

The Sixth Circuit, by contrast, did violence to *Ashe*'s doctrinal analysis when it cleaved the Double Jeopardy Clause's collateral estoppel component from the Clause itself. Pet. App. 60a ("[C]ollateral estoppel is a doctrine which exists independent of the Double Jeopardy Clause . . . ."). Bies has followed suit, maintaining that "the question here is not whether Bies was 'acquitted' of an offense (or sentence) in an earlier proceeding, but whether resolution of 'an issue of ultimate fact' in an earlier proceeding involving the same parties bars relitigation of that issue." Opp. to Cert. at 17. But while a factual finding in the defendant's favor is *necessary* for *Ashe* to apply, it is not *sufficient*. *Ashe* also requires "a valid and final judgment" in the

defendant's favor—that is, a "previous judgment of acquittal." 397 U.S. at 443, 444.

3. The Sixth Circuit's contrary analysis was not clearly established federal law at the time of the state post-conviction court's decision.

Even if the Sixth Circuit's interpretations of *Sattazahn* and *Ashe* were correct (and they are not), Bies remains ineligible for relief under AEDPA. Bies presented his double-jeopardy claim to the state post-conviction court, arguing "that [c]ourt findings establish that [he] is mentally retarded." Pet. App. 103a. The state court rejected that argument because, it determined, the earlier courts had made no findings for purposes of *Atkins*. Pet. App. 104a. It then concluded "that the double jeopardy clause does not require summary judgment in this case." Pet. App. 95a.

AEDPA does not allow the Sixth Circuit to overturn the state post-conviction court's decision, because that decision was not "contrary to" or "an unreasonable application of" this Court's decisions, 28 U.S.C. § 2254(d)(1), nor was it "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). See generally *Williams v. Taylor*, 529 U.S. 362, 405-13 (2000). As shown above, the Sixth Circuit's analysis is, at best, an ambitious extension of (if not contrary to) this Court's clearly established precedents concerning the meaning of "acquittal" in the capital-sentencing context and the scope of the Double Jeopardy Clause's collateral estoppel component. AEDPA therefore provides no grounds for habeas relief.

B. The state post-conviction proceeding does not implicate the Double Jeopardy Clause because it is not a second criminal proceeding brought by the State.

Even assuming that Bies has been "acquitted" or that the Double Jeopardy Clause's collateral estoppel component has some force without an acquittal, the Clause does not apply to this case for an additional reason. The Clause's text is limited to later incidents of "jeopardy." If there is no "jeopardy," there is no bar. And under no definition does a civil *Atkins* hearing on state post-conviction review qualify as "jeopardy."

1. The civil post-conviction remedy that Bies initiated does not put him in "jeopardy."

The Double Jeopardy Clause comes into play only if a person "for the same offence" is "twice put in jeopardy of life or limb." U.S. Const., amend. V. "Jeopardy," this Court has explained, "denotes risk"—specifically, "the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528 (1975). The Clause bars two kinds of risk: "successive punishment" and "successive prosecution." *Dixon*, 509 U.S. at 704; *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). It therefore protects against (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In all events, the Clause covers only "multiple *criminal* punishments for the same offense." *Hudson*

v. United States, 522 U.S. 93, 99 (1997); accord *Mitchell*, 303 U.S. at 399 ("[T]he double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."); *Black's Law Dictionary* 835 (defining "jeopardy" as "[t]he danger of conviction and punishment which the defendant in a criminal action incurs"); 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.1(c), p. 579 (3d ed. 2007) ("Generally, the prohibition has no application in noncriminal cases."). The question in a particular double-jeopardy case, then, is whether the subsequent proceeding or punishment is civil or criminal in nature. *Hudson*, 522 U.S. at 99.

The State of Ohio is subjecting Bies to neither a second criminal punishment nor a second criminal prosecution. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (per curiam). First and foremost, the State is not seeking to *punish* Bies at all in the state post-conviction proceeding. Bies's punishment already has been fixed; the State is merely defending that punishment against collateral attack. See *State v. Calhoun*, 714 N.E.2d 905, 909 (Ohio 1999) ("[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment."). If an *Atkins* hearing goes forward on state post-conviction review, either Bies will succeed in barring his execution or the sentence will remain in place. In neither event will the State be imposing a second punishment. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) ("[Only] actions intended to authorize criminal punishment . . . subject the defendant to 'jeopardy' within the constitutional meaning.").

Nor is the State subjecting Bies to a "successive prosecution." *Dixon*, 509 U.S. at 696. To begin with, the *State* is not subjecting Bies to anything; it is *Bies* who initiated the proceeding in question when he petitioned for post-conviction relief in state court under Ohio's Post-Conviction Remedy Act, Ohio Rev. Code § 2953.21(A)(1)(a). That is of course Bies's right, but "[t]his is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had . . . been found not guilty." *Scott*, 437 U.S. at 96. "[N]one of [the Fifth Amendment's] provisions is implicated *except by action of the government* that it binds . . . ." *United States v. Balsys*, 524 U.S. 666, 673 (1998) (emphasis added).

Regardless of who started it, the state post-conviction proceeding is civil, not criminal, in nature. Under Ohio law, post-conviction review is a "civil proceeding, in which the prosecuting attorney represents the state as a party." *State v. Milanovich*, 325 N.E.2d 540, 542 (Ohio 1975); accord *Calhoun*, 714 N.E.2d at 909; *State v. Williams*, No. 06AP-842, 2006 Ohio App. Lexis 5406, **2-3 (Ohio Ct. App. Oct. 17, 2006). Because the proceeding is civil, the rules "applicable to civil actions" apply at least in part, see *State v. Nichols*, 463 N.E.2d 375, 378 (Ohio 1984)[1]—a factor that "indicates clearly" the proceeding's civil nature, *Mitchell*, 303 U.S. at 402. To the extent that a state post-conviction proceeding resembles a

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[1] At one point in *Nichols* the Ohio Supreme Court called post-conviction proceedings "quasi-civil," but it then underscored the *Milanovich* passage that characterized the proceedings simply as "civil," and it reiterated that the statutory post-conviction "framework is civil, not criminal, although by necessity postconviction relief proceedings admittedly have an impact on adjudicated felons." 463 N.E.2d at 377.

habeas action, those actions, too, are classified as civil under both Ohio law, *Fuqua v. Williams*, 797 N.E.2d 982, 983 (Ohio 2003) (per curiam), and federal law, *Browder v. Dir., Dep't of Corrs.*, 434 U.S. 257, 269 (1978). Because "a civil proceeding following a criminal prosecution simply is not a second 'jeopardy,'" *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 793 (1994) (O'Connor, J., dissenting), the Double Jeopardy Clause does not bar Bies's post-conviction proceeding in the Ohio courts.

2. The Double Jeopardy Clause's collateral estoppel component applies only in cases of "jeopardy."

The Double Jeopardy Clause's collateral estoppel component derives from the same text—"twice put in jeopardy"—and therefore tracks the same meaning of "jeopardy" described above. In other words, *Ashe* did nothing to relax the rule that double "jeopardy" arises only when the government seeks to re-prosecute or re-punish.

The *Ashe* Court adhered to the Clause's "put in jeopardy" language by limiting the reach of the collateral estoppel rule to successive criminal prosecutions. The purpose of the collateral estoppel doctrine in the criminal context, the Court explained, was to check "the potential for unfair and abusive reprosecutions that became far more pronounced" with the proliferation of statutory offenses. *Ashe*, 397 U.S. at 445 n.10. With that end in mind, the question in *Ashe* was "simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally *hale him before a new jury* to litigate that issue again." *Id.* at 446 (emphasis added).

Ashe's assessment of the facts further underscored the Court's fidelity to the textually required presence of a second "jeopardy." The defendant was accused of robbing six participants in a poker game. He first stood trial for robbing just one of the poker players; when the jury acquitted him, the State brought him to trial for robbing a different player in the same game. *Id.* at 437-39. After noting that the State could not have retried the defendant on the very same charge following his acquittal, the Court explained that "[t]he situation is constitutionally no different here, even though the second trial related to another victim of the same robbery." *Id.* at 446. The Court held that "the constitutional guarantee forbids" what "the State . . . frankly conceded": that "it treated the first trial as no more than a dry run for the second prosecution." *Id.* at 447. It was the State's attempted reprosecution, in other words, that raised double-jeopardy concerns.

Later cases confirm that the collateral estoppel component is not a freestanding doctrine but is instead triggered only when the government initiates subsequent criminal proceedings. In *Dixon*, the Court noted that "[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later *prosecution* for a separate offense where the Government has *lost* an earlier prosecution involving the same facts." 509 U.S. at 705 (first emphasis added and internal citation omitted). Similarly, the Court in *Dowling* summarized the rule of *Ashe*: "A second *prosecution* was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion." 493 U.S. at 348 (emphasis added).

Thus, in *Turner*, 407 U.S. at 368-69, and *Harris v. Washington*, 404 U.S. 55, 55-57 (1971) (per curiam), the Court applied *Ashe* to bar the indictment and prosecution on new charges of defendants who had been acquitted of murders arising out of the same circumstances.

The courts of appeals likewise have understood that *Ashe*'s collateral estoppel rule applies only within the confines of the Double Jeopardy Clause's "twice put in jeopardy" language. As the Tenth Circuit observed, "state courts are constitutionally required to apply principles of collateral estoppel in criminal cases if and only if the protections of the Double Jeopardy Clause have been triggered." *Smith v. Dinwiddie*, 510 F.3d 1180, 1187 (10th Cir. 2007); see also *United States v. Bowman*, 609 F.2d 12, 17 (D.C. Cir. 1979) (same); *United States v. Venable*, 585 F.2d 71, 75 (3d Cir. 1978) (same). To that end, the courts have recognized that *Ashe*'s collateral estoppel protection "applies insofar as it is necessary to safeguard against the risk of double jeopardy, i.e., the risk of unfair and abusive reprosecutions." *Showery v. Samaniego*, 814 F.2d 200, 203 (5th Cir. 1987); accord *United States v. Dionisio*, 503 F.3d 78, 85 (2d Cir. 2007) ("[T]here must be jeopardy in order for there to be double jeopardy."); *United States v. Castro*, 629 F.2d 456, 464 (7th Cir. 1980) ("[T]he doctrine of collateral estoppel . . . applies to multiple prosecutions."); *Standlee v. Rhay*, 557 F.2d 1303, 1305 (9th Cir. 1977) ("The nature of the sanction imposed by a proceeding also is determinative of whether collateral estoppel applies.").

The Sixth Circuit was therefore wrong to unmoor the collateral estoppel doctrine from the Double Jeopardy Clause's "put in jeopardy" text.

3. Bies's post-conviction proceeding does not implicate the purposes of the Double Jeopardy Clause.

"[T]he primary purpose of the Double Jeopardy Clause" and its collateral estoppel component is "to protect the integrity of a final judgment." *Scott*, 437 U.S. at 92; accord *Crist v. Bretz*, 437 U.S. 28, 33 (1978). That purpose is not offended when Bies is put to his proof in a civil post-conviction proceeding that he initiated after his conviction became final.

The finality principle is critical under the Double Jeopardy Clause because of the nature of the stakes:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); see also *United States v. Jorn*, 400 U.S. 470, 479 (1971) ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the

individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."). The Clause therefore protects the repose interests of the defendant from the "unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant," *Scott*, 437 U.S. at 91, by taking a "second crack" at conviction, *Swisher v. Brady*, 438 U.S. 204, 216 (1978); see also *DiFrancesco*, 449 U.S. at 130; *Ashe*, 397 U.S. at 445 n.10, 447.

The state post-conviction proceeding at issue in this case implicates none of these anti-harassment, finality, and repose interests. First, the State of Ohio is not harassing Bies with repeated proceedings, because it was Bies who initiated the collateral attack on his sentence in state court. While it is assuredly Bies's right to pursue that remedy, it is just as assuredly the State's right to defend the judgment. The Clause "guards against Government oppression"; it "does not relieve a defendant from the consequences of his voluntary choice." *Scott*, 437 U.S. at 99. Second, the "concern with protecting the finality of acquittals is not implicated when, as in th[is] case[], a defendant is sentenced to death, *i.e.*, 'convicted.' There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has." *Poland*, 476 U.S. at 156. Finally, the State is not offending Bies's repose interests by putting him to the "perilous choice" of risking an increased punishment on retrial if he exercises his "right to file a potentially meritorious appeal." *Sattazahn*, 537 U.S. at 126 (Ginsburg, J., dissenting). Win or lose on

state post-conviction review, Bies will never face an *increased* sentence.

To the extent the finality of Bies's sentencing judgment is in doubt, it is by Bies's doing, not the State's. The Double Jeopardy Clause does not apply to this case.

C. The Sixth Circuit incorrectly applied basic collateral estoppel principles to bar the Ohio courts from making an *Atkins* determination for the first time.

Even assuming the Double Jeopardy Clause's collateral estoppel component applies in this case, Bies has not satisfied the requirements for collateral estoppel (or issue preclusion). That doctrine prohibits relitigation of an issue that has been "*actually* and *necessarily* determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added). Specifically, relitigation of an issue is precluded if: (1) the precise issue raised in the present case was raised and litigated in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom preclusion is sought had a full and fair opportunity to litigate the issue in the prior proceeding. *NAACP v. Detroit Police Officers Ass'n*, 821 F.2d 328, 330 (6th Cir. 1987).

Those requirements are not satisfied here. Two issues are at play in this case: (1) Bies's mental retardation for purposes of mitigation, and (2) Bies's mental retardation for purposes of *Atkins*. Those

issues are not the same, in no small part because *Atkins* fundamentally changed the applicable law. The Ohio Supreme Court therefore did not actually resolve the second question when it decided the first. Moreover, a mental-retardation finding was not necessary to the Ohio Supreme Court's judgment affirming Bies's sentence, and the State of Ohio has not yet had a full and fair opportunity to litigate the *Atkins* issue. In nonetheless applying collateral estoppel to this case, the Sixth Circuit deprived the Ohio courts of their first chance to adjudicate Bies's *Atkins* claim and thereby contravened both AEDPA and principles of comity.

1. The Ohio Supreme Court did not actually determine the fact of Bies's mental retardation under *Atkins*.

Issue preclusion applies here only if the Ohio Supreme Court actually determined that Bies is mentally retarded within the meaning of *Atkins*. It is unclear, as an initial matter, whether the state court's passing statement—that "Bies's . . . mild to borderline mental retardation merit[ed] some weight in mitigation," Pet. App. 120a—even amounts to a factual finding to which issue-preclusion analysis applies. See Pet. App. 22a (Sutton, J., dissenting) ("I will accept for the sake of argument that the Ohio courts independently determined that Bies is mentally retarded in upholding his death penalty conviction, even though that is far from clear."). But whatever doubt might exist as to what the Ohio Supreme Court *did* do, it is clear what the court did *not* do: It did not find Bies mentally retarded under *Atkins*.

a. The Ohio Supreme Court could not have decided the *Atkins* issue before there was an *Atkins* issue to decide.

When the Ohio Supreme Court reviewed Bies's conviction and sentence in 1996, neither the Eighth Amendment nor Ohio law prohibited the execution of mentally retarded persons. See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989); *State v. Rojas*, 592 N.E.2d 1376, 1383 (Ohio 1992). This Court altered course when it held in 2002 that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (citation omitted). That change in the law was just that—a change in the law—and issue preclusion does not apply when intervening decisions substantially affect the legal question.

Collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600 (1948). The doctrine accordingly "has no bearing" on a case "[i]f the legal matters determined in the earlier case differ from those raised in the second case," such as when "a judicial declaration intervening between the two proceedings . . . change[s] the legal atmosphere." *Id.* at 600; see also *Montana*, 440 U.S. at 155 (asking "whether controlling facts or legal principles have changed significantly"). "Preclusion is most readily defeated by specific Supreme Court overruling of precedent relied upon in reaching the first decision." *Federal*

Practice and Procedure § 4425, p. 674; see also Restatement at § 28 cmt. c.

Atkins unquestionably changed the Eighth Amendment landscape. In overruling *Penry*, the decision "announced a new rule of law," *Commonwealth v. Miller*, 888 A.2d 624, 629 n.5 (Pa. 2005), that "drastically changed" the "significance of the issue of mental retardation," *State v. Dunn*, 831 So.2d 862, 886 (La. 2002). In the parlance of *Teague* analysis, *Atkins* pronounced a new, substantive rule that placed a class of defendants beyond the government's ability to punish capitally. See *Penry*, 492 U.S. at 329-30 (citing *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)).

The Ohio Supreme Court's reaction to *Atkins* underscores the change *Atkins* wrought. Ohio law prohibits successive petitions for post-conviction review except in certain limited circumstances. Ohio Rev. Code § 2953.23(A). The Ohio Supreme Court held that one of those exceptions applied to a successive post-conviction petition raising an *Atkins* claim, "because the Supreme Court ha[d] recognized a new federal right applying retroactively to convicted defendants facing the death penalty." *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002). The *Lott* court then rejected the State's argument that res judicata barred the inmate's mental-retardation claim: "Admittedly, he could have raised mental retardation as a mitigating factor during the penalty phase of the trial, but not as a complete bar to the death penalty," and he also lacked "*Atkins*'s guidance as to what constitutes mental retardation." *Id.* The court therefore remanded the case for the trial court to assess the defendant's mental-

retardation claim in light of the new standards and procedures set forth in the court's opinion. *Id.* at 1016.

The Ohio Supreme Court in *Lott* recognized the obvious: that *Atkins* ushered in a new regime, and that earlier cases could not have decided the *Atkins* issue. After all, "[a] question cannot be held to have been adjudged before an issue on the subject could possibly have arisen." *Third Nat'l Bank of Louisville v. Stone*, 174 U.S. 432, 434 (1899). Issue preclusion does not apply in the wake of such fundamental changes in the law.

b. Under Ohio law, mental retardation for mitigation purposes differs from mental retardation for *Atkins* purposes.

Even aside from the watershed nature of *Atkins*, the Ohio Supreme Court did not "actually decide" the *Atkins* issue in 1996 because the post-*Atkins* inquiry into mental retardation in Ohio materially differs in both procedural and substantive ways from the pre-*Atkins* mitigation inquiry. Because of those differences, the Sixth Circuit was wrong to conclude that "the state supreme court applied the same clinical definition of mental retardation in its determination that [Bies] is mentally retarded" as required by *Atkins*. Pet. App. 49a; see also *id.* at 11a (Clay, J., concurring) ("Had the identical finding of fact been made in an *Atkins* hearing, that finding alone would have been sufficient to render Bies ineligible for the death penalty.").

Before *Atkins*, evidence of a capital defendant's mental retardation was admissible during the penalty phase under two separate statutory mitigating factors. First, factor (3) of the Ohio mitigation statute instructed the sentencer to consider "[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Ohio Rev. Code § 2929.04(B)(3) (LexisNexis 1996). The question under factor (3), then, was whether the offender's mental-retardation evidence showed an inability to understand and obey the law. See, e.g., *State v. Gumm*, 653 N.E.2d 253, 270 (Ohio 1995) ("[D]espite his low IQ, Gumm is able to distinguish right from wrong . . . ."); *State v. Hill*, 595 N.E.2d 884, 901 (Ohio 1992) ("[W]e find a very tenuous relationship between the acts he committed and his level of mental retardation."); *State v. Jenkins*, 473 N.E.2d 264, 301-02 (Ohio 1984) ("There was no evidence to suggest that appellant's low intelligence distorted the decision-making processes he employed in perpetrating this robbery and murder . . . .").

The Ohio statutory mitigation statute also contained a catch-all provision—factor (7)—that instructed sentencers to consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." Ohio Rev. Code § 2929.04(B)(7) (LexisNexis 1996). This catch-all category permitted the sentencer to consider a wide range of mitigating factors, including "the defendant's character and record, and the circumstances of the particular offense." *State v. Holloway*, 527 N.E.2d 831, 834 (Ohio 1988) (citing

Lockett v. Ohio, 438 U.S. 586 (1978)). As Bies's own case illustrates, that range of factors included low intelligence and mental disorders. Pet. App. 120a; see also, e.g., *State v. Jones*, 744 N.E.2d 1163, 1181 (Ohio 2001) (considering evidence of intelligence and psychological disorders). Under neither factor (3) nor factor (7), however, did Ohio statutory or case law define "mental retardation," and with reason: Because the mitigation factors were capacious, the sentencer was not restricted to considering only evidence of mental retardation in the strict sense; any evidence of mental deficiencies was relevant.[2]

Atkins created a need for what did not exist before: substantive and procedural standards to guide the mental-retardation determination in Ohio. See *Lott*, 779 N.E.2d at 1014 (noting "the absence of a statutory framework to determine mental retardation"). The *Atkins* Court expressly left "'to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)); see *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death."). The Ohio Supreme Court picked up that mantle six months later in *State v. Lott*, for the first time adopting a clinical definition of mental retardation

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[2] Both factors (3) and (7) remain materially the same today and are available for capital defendants with mental deficiencies that do not rise to the level of mental retardation. Ohio Rev. Code § 2929.04(B)(3) & (7) (LexisNexis 2008).

and prescribing procedures for the determination. 779 N.E.2d at 1014-15.

The Ohio Supreme Court in *Lott* first articulated a three-part substantive test for determining whether a defendant is mentally retarded under the Eighth Amendment: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Id.* at 1014 (citing *Atkins*, 536 U.S. at 308 n.3). The court held that an IQ score above 70 established a rebuttable presumption that the defendant was not mentally retarded, but it cautioned that IQ score alone was not sufficient to make a final determination on the issue. *Id.*; see also *State v. Were*, 890 N.E.2d 263, 293 (Ohio 2008) ("Nothing in *Lott*, however, states that a capital defendant must be found mentally retarded if his IQ scores are below 70, regardless of the testing method used to determine those scores."). An *Atkins* claimant must "raise and prove" all three substantive *Lott* factors in order to receive relief. *Were*, 890 N.E.2d at 292; accord *State v. Stallings*, No. 21969, 2004 Ohio App. Lexis 4167, at **4 (Ohio Ct. App. 2004).

The evidence of mental retardation introduced at Bies's penalty phase did not provide a basis for judgment on *Lott*'s three-part substantive definition. By the Sixth Circuit's own admission, the Ohio Supreme Court's "finding that [Bies] is mentally retarded was based *solely* on the diagnosis of Dr. Donna Winter, a licensed clinical psychologist." Pet. App. 51a (emphasis added). But Dr. Winter's report and testimony did not carefully assess each of the

three *Lott* factors. On the first factor, for instance, Winter concluded that Bies has a full-scale IQ of 68, but she stated that he "functions on a slightly higher level than test results would indicate." J.A. 211. And her characterization of Bies's mental retardation as "mild" to "borderline," J.A. 213, is in tension with the clinical definitions incorporated in *Lott*, which do not recognize a category of "borderline mental retardation."[3] Nor did Winter address record evidence to the contrary, such as multiple findings that Bies's IQ is higher than 70. See Pet. App. 102a (citing exhibits to Petition to Vacate); 6th Cir. J.A. 1425. As to the second *Lott* factor, the Sixth Circuit suggested that Winter used the *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1987) (DSM-III) to find that Bies has adaptive-skills limitations, Pet. App. 51a n.7, 52a, but neither Winter's testimony nor her report mentioned the DSM-III. More to the point, Winter did not expressly address any deficiencies in adaptive skills. She opined on Bies's shortcomings—including that he is "functionally illiterate" and "doesn't think logically," J.A. 212—but those passing observations do not suffice to establish significant limitations in two adaptive skill areas as *Lott* requires.

In addition to substantive standards, the Ohio Supreme Court in *Lott* prescribed procedural guidelines for trial courts to use in assessing claims

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[3] The clinical definitions instead recognize a classification called "borderline intellectual functioning," which means that the individual has below average cognitive ability, but the deficit is not as severe as mental retardation. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders Text Revision* 740 (4th ed. 2000) (DSM-IV-TR) (borderline intellectual functioning is an IQ in the 71-84 range).

of mental retardation. *Lott* instructed that the trial court should "rely on professional evaluations," "conduct its own de novo review of the evidence in determining whether a defendant is mentally retarded," and "make written findings and set forth its rationale for finding the defendant mentally retarded or not mentally retarded." 779 N.E.2d at 1015. *Lott* explained that the "trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency." *Id.*

The purported findings of Bies's mental retardation on direct review fell short of those procedural guidelines. Neither the trial court nor any other Ohio court conducted a de novo review to determine whether Bies is mentally retarded, and the trial court issued no written findings on the matter. The Ohio Supreme Court therefore had no written mental-retardation "findings" to review when it conducted its statutorily mandated, independent evaluation of "all of the facts" to "determine whether the aggravating circumstances . . . outweigh[ed] the mitigating factors in the case, and whether the sentence of death [was] appropriate." Ohio Rev. Code § 2929.05 (LexisNexis 1996); cf. *Were*, 890 N.E.2d at 290-294 (reviewing in detail trial court's written *Lott* findings).

In the wake of *Atkins*, the determination of mental retardation in capital cases must be undertaken with "careful application of current clinical understanding" and "every effort to assure the scientific integrity and fairness" of the evaluation. Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote*

Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811, 860 (2007). "[T]he subtleties and the difficulties of using scientific standards in a legal setting are most pronounced when the defendant arguably falls within the mild range of mental retardation," where "IQ scores should rarely be taken at face value and . . . adaptive behavior . . . will be of particular relevance, as well as most challenging." *Id.* By those lights, the mental-retardation evidence introduced at Bies's penalty phase was thin. It does not behoove either party to suggest that a record so slight suffices to decide a matter so serious.

The record was thin because the issue was not *Atkins*. The Ohio Supreme Court therefore did not actually decide the *Atkins* question, and issue preclusion does not apply.

2. Any finding as to Bies's mental retardation under *Atkins* was not necessary to the Ohio Supreme Court's affirmance of Bies's death sentence.

The second element of the collateral estoppel test is likewise missing in this case, because a finding regarding Bies's mental retardation was not necessary to the Ohio Supreme Court's decision on direct review.

As explained in Part A above, collateral estoppel "'attaches only to determinations that were *necessary* to support the judgment'" in the first action—in this case, the ultimate decision affirming the death penalty. *Schiro v. Farley*, 510 U.S. 222, 233 (1994) (quoting 18 Wright, Miller & Cooper,

Federal Practice and Procedure § 4421, p. 192 (1981)) (emphasis added). The question is not whether it was necessary for a court to resolve a factual question, but rather whether it was necessary for the court to resolve the factual question *the way that it did* to support the judgment. "If issues are determined but the judgment is not *dependent* upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Restatement at § 27 cmt. h (emphasis added); accord *Red Lake Band v. United States*, 607 F.2d 930, 934 (Ct. Cl. 1979).

The Ohio Supreme Court did not need to determine whether Bies was mentally retarded in order to uphold his death sentence. As the Sixth Circuit correctly noted, Pet. App. 56a n.8, state law required that the Ohio Supreme Court independently assess the appropriateness of the death penalty and weigh the aggravating and mitigating circumstances. Ohio Rev. Code § 2929.05(A) (LexisNexis 1996). But the Sixth Circuit then erroneously reasoned that each individual aggravating and mitigating finding along the way carries preclusive effect. Pet. App. 57a.

On the contrary, the only finding that carries preclusive effect—because it is the only one on which the judgment hinges—is the final outcome of the balancing. Whether or not the Ohio Supreme Court found that Bies was mentally retarded for purposes of mitigation did not matter, in the end, to his sentence; what mattered was that the court found that the aggravating circumstances outweighed the mitigating factors. In fact, to the extent the Ohio Supreme Court made a mental-retardation finding, it

was in Bies's favor, and yet the court affirmed the death penalty. In this sense Bies's case is akin to a contributory-negligence case in which the jury finds that the defendant was negligent but nonetheless renders judgment in her favor because it also finds that the plaintiff was contributorily negligent. Such findings—"contrary to the judgment in the sense that, standing alone, they would conduce to an opposite judgment"—have "long been accepted as paradigms of the unnecessary conclusions that are not preclusive in later litigation." *Federal Practice and Procedure* § 4421, p. 551-52.

Any finding as to Bies's mental retardation made no difference in his sentence. "Such determinations have the characteristics of dicta," and "the interest in providing an opportunity for a considered determination . . . outweighs the interest in avoiding the burden of relitigation." Restatement at § 27 cmt. h.

3. Applying collateral estoppel deprives the State of a full and fair opportunity to litigate claims of mental retardation under *Atkins*.

Issue-preclusion rules also do not estop the State of Ohio from contesting Bies's *Atkins* claim because the State lacked a "full and fair opportunity" to litigate the issue earlier. *Allen v. McCurry*, 449 U.S. 90, 95 (1980).

Hornbook law dictates that "preclusion should not operate . . . if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing

party's failure to litigate the issue fully." Restatement at § 28 cmt. i; *Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1980) ("Inadequate incentive to litigate is an exception to non-mutual estoppel."); *Hyman v. Regenstein*, 258 F.2d 502, 511 (5th Cir. 1958) ("[C]ollateral estoppel by judgment is applicable only when . . . it was foreseeable that [a] fact would be of importance in possible future litigation."); see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979); *The Evergreens v. Nunan*, 141 F.2d 927, 929 (2d Cir. 1944). "Such instances are rare, but they may arise, for example, between institutional litigants as a result of a change in the law." Restatement at § 28 cmt. i.

Atkins worked a dramatic change in the law that was not foreseeable when the Ohio Supreme Court reviewed Bies's death sentence in 1996. Before *Atkins*, evidence of a capital defendant's mental retardation in Ohio received "some weight" in mitigation, but not much. *State v. Fears*, 715 N.E.2d 136, 155 (Ohio 1999); accord *Hill*, 595 N.E.2d at 901; *State v. Waddy*, 588 N.E.2d 819, 840 (Ohio 1992); *Holloway*, 527 N.E.2d at 839. The State therefore had little incentive to litigate the issue of a defendant's mental retardation, and instead ordinarily focused on its burden to establish aggravating circumstances. See *State v. Hill*, 894 N.E.2d 108, 118 (Ohio Ct. App. 2008).

Moreover, a "decision cannot be given collateral estoppel (or res judicata) effect if the party sought to be bound could not have appealed it." *White v. Elrod*, 816 F.2d 1172, 1174 (7th Cir. 1987); accord *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995). Here, the State won; Bies's conviction

and sentence were affirmed on direct review. It is not clear how the State could have appealed that victory—or specifically the Ohio Supreme Court's comment regarding Bies's mental retardation—to this Court. And even if the State *could* have appealed, it had no *incentive* to do so. See *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 254 (3d Cir. 2006) ("Without an 'incentive to appeal, the losing litigant will be less likely to consider collateral consequences of the erroneous ground, and this may disadvantage him unfairly later, unless he is particularly prescient.'" (quoting *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168 (5th Cir. 1981))). Requiring parties to file "cautionary appeals" to avoid potential preclusive effects in such circumstances would increase litigation and undermine the "principles of judicial economy which motivated the doctrine of collateral estoppel in the first place." *Id.* at 254 (internal quotations and citation omitted).

4. Comity principles and AEDPA weigh heavily against federal court interference before an *Atkins* hearing has been held.

The above discussion illustrates that the Sixth Circuit's issue-preclusion analysis was incorrect. But even if doubt exists on the collateral estoppel question, the Sixth Circuit should have deferred to the state court's decision on the matter.

The Ohio post-conviction court considered but rejected Bies's argument that the issue of his mental retardation was already determined. Pet. App. 95a, 101a-104a. The state court found that neither the intermediate appellate court nor the Ohio Supreme

Court on direct review evaluated the mental-retardation issue "under the legal standard of *Atkins* and *Lott*, which had yet to be decided." Pet. App. 103a. The court further found that the mental-retardation evidence already in the record did not suffice for an *Atkins* determination, because the experts' "statements regarding mental retardation [were] made in a conclusory manner without any analysis," Pet. App. 102a n.1, and thus the court was "unable to determine whether the experts applied the test as laid out by the courts to determine this issue," Pet. App. 102a. The court accordingly rejected Bies's collateral estoppel argument and ordered an *Atkins* hearing. Pet. App. 104a.

The state post-conviction court's decision warrants deference under AEDPA because Bies cannot show that the determination was "contrary to" or "an unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1). The state court's analysis comports with hornbook issue-preclusion rules and does not "appl[y] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405. And the court's application of those settled rules to the facts of Bies's case was not "objectively unreasonable." *Id.* at 409.

The Sixth Circuit denied AEDPA deference on the ground that the Ohio post-conviction court's conclusion was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), *cited in* Pet. App. 62a-65a. Specifically, the Sixth Circuit found that the state court's conclusion is contradicted by "overwhelming evidence that Dr. Winter did in fact apply the clinical

standard" in finding that Bies is mentally retarded. Pet. App. 65a. Even if the Sixth Circuit's characterization of the record were correct (and it is not), at best it demonstrates that the Ohio Supreme Court "actually" decided the mental-retardation issue. It does not establish that the finding was *necessary* to the judgment, nor does it undermine the Ohio post-conviction court's observation that "*Atkins* and *Lott* . . . had yet to be decided," Pet. App. 103a, which shows that the State lacked a full and fair opportunity to contest the issue.

The reasonableness of the state post-conviction court's ruling is confirmed by decisions from other state courts, in Ohio and elsewhere, distinguishing pre-*Atkins* mitigation findings from post-*Atkins* mental-retardation determinations. Every Ohio appellate court to consider the issue has concluded that "[t]he mitigation hearing, by definition, [does] not address the three-part test for mental retardation set forth in *Atkins* and adopted by Ohio in *Lott*." *State v. Lorraine*, No. 2003-T-0159, 2005 Ohio App. Lexis 2394, at **14 (Ohio Ct. App. May 20, 2005); accord *State v. Bays*, 824 N.E.2d 167, 171 (Ohio Ct. App. 2005); *State v. Hughbanks*, 823 N.E.2d 544, 548 (Ohio Ct. App. 2004); *State v. Carter*, 813 N.E.2d 78, 83 (Ohio Ct. App. 2004). Other state supreme courts have reached the same conclusion in similar cases. See, e.g., *Miller*, 888 A.2d at 632-33 (Pa.) (remanding for an *Atkins* hearing because "the prior testimony and evidence proffered at the penalty phase hearing . . . were not presented to establish [defendant's] mental retardation under *Atkins*"); *Dunn*, 831 So.2d at 886-87 (La.) (rejecting State's argument that jury's imposition of a death sentence pre-*Atkins* reflects a finding that defendant is not

mentally retarded for *Atkins* purposes); *State v. Smith*, No. 1060427, 2007 Ala. Lexis 91, at *37 (Ala. May 25, 2007) (remanding for *Atkins* hearing because defendant "could not have raised his *Atkins* claim . . . because *Atkins* had not yet been decided").

A second layer of deference to the state courts is also at work in this case. "Comity . . . dictates that when a [state] prisoner" raises a claim in federal habeas, "the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). The state post-conviction court was in the process of doing precisely that—reviewing the merits of Bies's *Atkins* claim for the first time—when the federal courts effectively enjoined the state court proceeding.

Such federal court intrusion in a state court proceeding might be warranted where a clear double jeopardy violation otherwise would occur, see, e.g., *Harpster v. Ohio*, 128 F.3d 322, 325-26 (6th Cir. 1997), but here the interference was founded on a determination that is itself properly left to the state courts. This Court expressly delegated the implementation of *Atkins* to the States. 536 U.S. at 317. Given that charge, the Ohio courts are best positioned to evaluate the effect *Atkins* had on Ohio law. They know better than the Sixth Circuit how Ohio courts treated mitigating evidence of mental retardation before *Atkins*, what opportunity and incentives the State had to contest that evidence pre-*Atkins*, what effect mitigation findings by the Ohio Supreme Court have on the ultimate sentencing judgment, and what mental-retardation determinations look like after *Atkins* and *Lott*. All of

these factors are critical to the issue-preclusion analysis, and the Ohio courts, not the Sixth Circuit, are best situated to make the collateral estoppel determination.

The Sixth Circuit essentially enjoined a state court hearing on the ground that the state court was wrong about its own law. That intrusion "unduly interfere[s] with the legitimate activities of the State[]" and fails to afford the "proper respect for state functions" that comity and federalism require. *Younger v. Harris*, 401 U.S. 37, 44 (1971). Had the Sixth Circuit instead been faithful to those principles, it would have given the Ohio courts the opportunity to consider Bies's *Atkins* claim for the first time. See Pet. App. 32a (Sutton, J., dissenting) ("[P]rinciples of comity and federalism mandate that we give the Ohio courts the first opportunity to apply [*Atkins*] to Bies' case.").

The trial record shows that Bies might succeed in proving at an *Atkins* hearing that he is mentally retarded. That record, however, is only a start; it was developed years before *Atkins* was decided, without any understanding of the detailed standards that now govern mental-retardation determinations. At this stage, the Warden is simply asking that Bies discharge his burden of proof on this claim for the first time.

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
bmizer@ag.state.oh.us

Counsel for Petitioner
David Bobby, Warden

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RESPONDENT'S BRIEF

No. 08-598

IN THE
SUPREME COURT OF THE UNITED STATES

David Bobby, Warden,
Petitioner,

v.

Michael Bies,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT

RANDALL L. PORTER
Office of the Ohio
Public Defender
250 E. Broad St., Ste. 250
Columbus, OH 43215-9308

S. SCOTT HAYNES
Hallowes, Allen & Haynes
6445 E. Livingston Avenue
Reynoldsburg, OH 43068

JOHN H. BLUME
(*Counsel of Record*)
KEIR M. WEYBLE
SHERI L. JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Respondent

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RESPONDENT'S STATEMENT OF THE CASE

I. The trial evidence, prosecutor's concessions and state courts' findings of mental retardation.

A. Trial and direct appeal.

At Michael Bies' trial, Dr. Donna Winter, the court's independent expert, using the generally accepted clinical definition of mental retardation, testified without contradiction that Bies was mentally retarded. The proof was such that even the Hamilton County prosecutor conceded in closing argument that Bies' "IQ ... [is] 68 ... Michael Bies is not intelligent. I think that we can all accept that." J.A. 66.

On direct appeal, the issue of Bies' mental retardation was briefed by the State and by Bies' counsel. Its importance for sentencing review was the direct consequence of Ohio's capital-sentencing law, which required the appellate courts in death cases to "review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate."[1] Both the Ohio

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[1]Ohio Rev. Code § 2929.05. *See also* Ohio Rev. Code § 2929.04(B) (enumerating aggravating and mitigating factors); *State v. Claytor*, 574 N.E.2d 472, 481 (Ohio 1991) ("The mitigating

Court of Appeals and the Ohio Supreme Court made independent findings that Bies was mentally retarded. In its independent review of the record, the Ohio Court of Appeals concluded that

> Bies' psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction characterized by specific learning disabilities . . . [and] are entitled to some weight in mitigation.

State v. Bies, 1994 Ohio App. LEXIS 1304, at *28 (Ohio Ct. App. March 30, 1994); J.A. 106. The Ohio Supreme Court in turn found that "Bies' personality disorder and mild to borderline mental retardation merit some weight in mitigation."[2] *State v. Bies*, 658 N.E.2d 754,

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factor involving Claytor's undisputed mental illness and the impact it had on his reasoning process should have been accorded more weight.").

[2]Both of these findings of mental retardation were made before the Ohio Supreme Court responded to *Atkins v. Virginia*, 536 U.S. 304 (2002), by formally adopting a standard for mental retardation in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). However, the Warden does not seriously dispute that Dr. Winter's pre-trial mental retardation diagnosis was rendered using the standard later adopted in *Lott*. *See* Petition for Writ of Certiorari at 26 ("This reasoning improperly assumes that because Dr.

761 (Ohio 1996).

B. State post-conviction proceedings prior to *Atkins*.

After the Ohio Supreme Court decided his case on direct appeal, Bies filed his first petition for state post-conviction relief. That petition included a claim that the execution of a mentally retarded person would constitute cruel and unusual punishment in violation of both the United States and Ohio Constitutions. J.A. 128-29. The petition further alleged that a new national consensus had developed since *Penry v. Lynaugh*, 492 U.S. 307 (1989), barring the execution of persons with mental retardation. J.A. 128. In response, the State conceded that "[t]he record reveals defendant to be mildly mentally retarded with an IQ of about 69," but asserted that relief should be denied because there was no legal prohibition against executing a person with mental retardation. J.A. 144.

The state post-conviction court's findings and conclusions mirrored the positions taken by the State:

> The defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. As to this claim, the Court makes the following Findings of Fact: (1) The defendant is shown by the record to be mildly mentally

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Winter applied the diagnostic method that was later outlined in *Lott* ....").

> retarded with an IQ of about 69. The Court makes the following Conclusions of Law: As a matter of law, a mildly mentally retarded defendant may be Punished [sic] by execution.

J.A. 153.[3]

On appeal from the denial of post-conviction relief, the State twice again conceded that Bies was mentally retarded. J.A. 160 (in the Ohio Court of Appeals); 184 (in the Ohio Supreme Court).

II. The State's reversal of course in response to *Atkins*.

This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), was handed down while Bies' second petition for post-conviction relief was pending in state court,[4] and his petition for federal habeas corpus relief was pending in the United States District Court for the Southern District of Ohio. Relying on *Atkins*, Bies returned to state court with a third petition for post-

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[3]The state post-conviction petition also included a claim that trial counsel was ineffective for failing to challenge Bies' confession on the basis of his mental retardation. While the court rejected the claim on the basis that Bies' "degree of retardation is not such that would not cause suppression," it made the factual finding that "defendant is mildly mentally retarded ...." J.A. 148.

[4]The claims raised in this second petition for state post-conviction relief were not related to the issues now before this Court.

conviction relief, again asserting that his execution would violate the Eighth Amendment because he is mentally retarded, and adding that the State was collaterally estopped from relitigating the factual issue of his mental retardation. J.A. 241-42.

Ignoring its own earlier concessions and the multiple state court findings of retardation, the State responded to the *Atkins* claim with the contention that "Bies' I.Q. score coupled with his adaptive behavior skills indicate that he is not mentally retarded." *See, e.g.*, Pl. Mem. in Opp'n to Def. Mot. For Summ. J., State of Ohio, Hamilton County, at 5 (Sept. 8, 2003). In response to Bies' estoppel argument, the State contended that the issue of Bies' mental retardation should be re-examined at an evidentiary hearing pursuant to the procedure outlined by the Ohio Supreme Court's decision in *Lott*. *Id.* Citing an inability "to determine whether the experts applied the test [for mental retardation] as laid out by the courts" in *Atkins* and *Lott*, the state post-conviction court denied Bies' motion for summary judgment. Pet. App. 102a.

III. Federal habeas corpus proceedings.

Bies returned to federal court challenging the state post-conviction court's determination that the factual question of his mental retardation could (and should) be relitigated. Applying the rule established by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), the Magistrate Judge recommended that the writ be granted because the prior findings of mental

retardation constituted determinations of an "ultimate fact" barring further litigation, and because the state court's decision to the contrary was factually and legally unreasonable under *Ashe*. Pet. App. 75a; *see also id.* at 77-78a (observing that, in light of three prior state court findings that Bies is mentally retarded, the "new procedures for determining mental retardation ... [were] immaterial"). The District Court adopted the Magistrate's Report and Recommendation. Pet. App. 67-68a.

On appeal by the Warden, the Sixth Circuit agreed with the district court's determination that relitigation of the settled fact of Bies' mental retardation was barred under *Ashe*'s rule that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Pet. App. 45a (quoting *Ashe*, 397 U.S. at 443). The Sixth Circuit supported this conclusion with a detailed analysis of the record developed at trial, the arguments asserted by the parties on direct appeal, the review undertaken and the findings rendered by the Ohio courts on direct appeal, and the standard for establishing mental retardation as applied by Dr. Winter prior to trial and later adopted by the Ohio Supreme Court in *Lott*. Pet. App. 45-62a.

Having determined that the Double Jeopardy Clause barred further litigation of Bies' mental retardation, the Sixth Circuit went on to conclude that habeas relief was authorized under 28 U.S.C. § 2254(d)(2) because "[c]lear and convincing evidence ...

demonstrate[s] that the Ohio state court based its decision to permit relitigation of [Bies'] mental retardation on *unreasonable determinations of fact*." Pet. App. 62a (emphasis added). The court explained that the state post-conviction court's claims of uncertainty about whether Dr. Winter had applied the mental retardation standard later adopted in *Lott* were "contrary to the record" because the record clearly showed that *Lott* had adopted the clinical test accepted by the psychological profession and that Dr. Winter had applied that test herself. Pet. App. 62-65a; *see also id.* at 342 ("In light of the overwhelming evidence that Dr. Winter did in fact apply the clinical standard recognized by her own profession, we conclude that clear and convincing evidence demonstrates that the Ohio trial court unreasonably found that Dr. Winter could have applied a different standard."). "Accordingly," the Sixth Circuit held, Bies' "double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact." *Id.* at 65a.

The Warden sought rehearing *en banc*, which was denied over Judge Sutton's dissent.[5] The Warden filed a petition for writ of certiorari in this Court, which was granted on January 16, 2009.

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[5]In his dissent from the denial of rehearing *en banc*, Judge Sutton acknowledged that Bies has an IQ of 69 and that "two licensed clinical psychologists have concluded he is mentally retarded." Pet. App. 31a. He further observed that Bies is "mildly mentally retarded," and that "Bies' I.Q. places him within the category of individuals the Court recognized might be affected by [*Atkins*]." *Id.*

SUMMARY OF ARGUMENT

This case is governed by *Ashe v. Swenson*, 397 U.S. 436 (1970), where this Court held that the "established [collateral estoppel] rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445. As articulated in *Ashe*, "'[c]ollateral estoppel' ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443.

While factual determinations implicating the collateral estoppel rule in criminal cases are, as a practical matter, most likely to be produced by a jury's or court's judgment of acquittal, nothing in *Ashe* or the substantial body of decisions upon which it relies establishes a formal acquittal as a precondition to the applicability of collateral estoppel. Likewise, while collateral estoppel is most likely to be invoked in a criminal case in response to a successive prosecution, *Ashe*'s preclusion of relitigation "in any future lawsuit" is not confined to such narrow circumstances. Rather, *Ashe*'s rule, which must be applied with "realism and rationality," *id.* at 444, easily accommodates cases, such as this one, necessitating enforcement of a new, retroactive rule of substantive law in a proceeding other than a successive prosecution.

The Ohio courts made multiple findings that Bies is mentally retarded. On direct appeal, both the Ohio Court of Appeals and the Ohio Supreme Court

made mental retardation findings as part of the independent review and reweighing mandated by state law and the Eighth Amendment. And in subsequent state post-conviction relief proceedings, the State conceded, and the Hamilton County Court of Common Pleas twice found, that Bies is "mildly mentally retarded ...." J.A. 148; 153. The State then repeated its concession in response to Bies' appeals to the Ohio Court of Appeals and the Ohio Supreme Court.

Contrary to the Warden's arguments, it is inconsequential that the series of findings and concessions concerning Bies' mental retardation occurred prior to this Court's decision in *Atkins*. This is so because the standard utilized by Dr. Winter at the time of Bies' trial was the same as the standard later adopted by the Ohio Supreme Court in the aftermath of *Atkins*. And while the legal consequences which attach to the factual determinations that Bies is mentally retarded certainly changed with *Atkins*, this Court's decisions make clear that such a change does not render collateral estoppel inapplicable.

Finally, the Warden's assertion that the State lacked a full and fair opportunity to litigate Bies' mental retardation prior to *Atkins* is both legally irrelevant and factually unsustainable. As illustrated in *Harris v. Washington*, 404 U.S. 55 (1971), the possibility that a party may produce additional evidence relevant to a previously determined factual issue is not a basis for withholding application of collateral estoppel with respect to the prior determination. Furthermore, the suggestion that Ohio

prosecutors lacked incentives to aggressively litigate mental retardation prior to *Atkins* is factually unsound. Long before *Atkins*, mental retardation was widely recognized as a powerful mitigating circumstance, and it was directly relevant, *inter alia*, to the balancing of aggravating and mitigating circumstances undertaken by the state courts in Bies' case. Additionally, given this Court's remarks in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and the ensuing national trend toward exempting individuals with mental retardation from the death penalty, it was hardly unforeseeable to prosecutors in Bies' case that such an exemption would reach Ohio.

ARGUMENT

Two of the three Questions Presented by the Warden contain express invocations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), coupled with suggestions that the Sixth Circuit's decision below conflicted with the "clearly established federal law" clause of 28 U.S.C. § 2254(d)(1). *See* Pet. Br. i (Questions 1 and 3). However, as demonstrated by the lack of attention to AEDPA in the Warden's brief, and by the face of the Sixth Circuit's opinion, this is not a § 2254(d)(1) case at all. Rather, what the Warden now presents to this Court is simply a request that the Court correct a purported error in the Sixth Circuit's application of settled Double Jeopardy principles to the admittedly idiosyncratic factual circumstances of this unique record.

While the factual situation in this case is indeed unusual, the governing rule of decision is not. That rule was articulated by this Court nearly forty years ago in *Ashe v. Swenson*, 397 U.S. 436 (1970), and Bies requires no more than application of the plain language of *Ashe*'s rule in order to prevail on his collateral estoppel argument.

I. Bies' claim fits within the collateral estoppel rule articulated in *Ashe*.

A. The rule of *Ashe*.

In *Ashe v. Swenson*, this Court defined collateral estoppel as "mean[ing] simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443.

The issue in *Ashe* was whether this "extremely important principle" "is a part of the Fifth Amendment's guarantee against double jeopardy."[6] *Id.* at 442, 443. While pre-*Benton* decisions had effectively prevented the development of a uniform constitutional rule of collateral estoppel applicable to state criminal cases, the same was not true on the federal side. On

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[6]This question remained open until 1970 because, prior to *Benton v. Maryland*, 395 U.S. 784 (1969), the Double Jeopardy Clause had not been held to be applicable to the States. Before *Benton* and *Ashe*, application of collateral estoppel was "a matter to be left for state court determination within the broad bounds of 'fundamental fairness' ...." *Ashe*, 397 U.S. at 442-43.

the contrary, "collateral estoppel ha[d] been an established rule of federal criminal law at least since [the] decision ... in *United States v. Oppenheimer*, 242 U.S. 85 [(1916).]" *Id.* at 443; *see also id.* (quoting Mr. Justice Holmes in *Oppenheimer*, 242 U.S. at 87) ("'It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.'").

Having recognized the existence of a substantial body of "federal decisions" applying a well-developed "federal rule" of collateral estoppel, this Court framed the "ultimate question to be determined" in *Ashe* as "whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445. The Court answered this question emphatically: "We do not hesitate to hold that it is." *Id.*; *see also Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) ("In *Ashe v. Swenson*, ... we held that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments.").

B. The collateral estoppel rule recognized in *Ashe* does not require the sort of formal acquittal upon which the Warden insists.

The Warden asserts that collateral estoppel is inapplicable in this case because no formal "acquittal" has been entered for Bies by a judge or jury. *See* Pet.

Br. 12-23. This view is inconsistent with *Ashe* and with the "established rule of federal law"which *Ashe* held to be "embodied in the Fifth Amendment guarantee against double jeopardy."

In collateral estoppel doctrine, as distinguished from the doctrines of *autrefois convict* and *autrefois acquit*, a judgment of acquittal or other verdict is not significant in its own right; it is significant only because it constitutes "a determination favorable to ... [the defendant] of the facts essential" to an issue which the prior proceeding was required to resolve. *Sealfon v. United States*, 332 U.S. 575, 578 (1948). This is reflected in *Ashe*'s articulation of the collateral estoppel rule as applicable "when an issue of ultimate fact has once been determined by a valid and final judgment." While, as a practical matter, a factual determination meeting this description in a criminal case is most likely to be made as part of a jury's or trial court's judgment of acquittal, that likelihood is merely a function of the ordinary allocation of fact-finding responsibilities in American criminal procedure, not a requirement of the collateral estoppel doctrine. Rather, as *Ashe*'s plain language makes clear, "a valid and final judgment" is all that is required to trigger collateral estoppel, regardless of whether that judgment takes the precise form of an "acquittal."

Moreover, as this Court noted in *Ashe*, "[t]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and

rationality." *Ashe*, 397 U.S. at 444. This emphasis on pragmatism over formality is illustrated in *United States v. Oppenheimer*, cited in *Ashe* as a leading example of the "established rule of federal law ... embodied" in the Double Jeopardy Clause. In *Oppenheimer*, this Court upheld a defendant's plea that a second attempt to prosecute him was precluded by collateral estoppel, not because he had been acquitted of the charged offense by a judge or jury (he had not), but because an earlier attempt to prosecute him had been found time-barred under the applicable statute of limitations. While this Court termed the trial court's judgment an "acquittal," it plainly defined that term more broadly than the Warden's present argument envisages:

> It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue (...), but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words.

Oppenheimer, 242 U.S. at 87.

This Court has also applied collateral estoppel to a factual determination by a state appellate court in a criminal case. In *Frank v. Mangum*, 237 U.S. 309 (1915) – another of the decisions cited by *Ashe* as examples of the collateral estoppel rule "embodied in the Fifth Amendment guarantee against double jeopardy," *Ashe*, 397 U.S. at 443 n.7 – this Court explained:

> [N]o doubt is suggested but that the [Georgia] supreme court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; ... It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

Frank, 237 U.S. at 333-34 (citing *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 48 (1897)).

C. Application of *Ashe*'s collateral estoppel rule is not limited to a distinct, successive prosecution.

The Warden also argues that the collateral estoppel rule embraced by *Ashe* applies "only when the government seeks to re-prosecute or re-punish," and that no such effort was made by the State of Ohio during the state post-conviction proceeding underlying this case. *See* Pet. Brf. 27-32. Once again, the Warden's argument is at odds with *Ashe*.

The rule *Ashe* recognized as "embodied in the Fifth Amendment guarantee against double jeopardy" is that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties *in any future lawsuit*." *Ashe*, 397 U.S. at 443 (emphasis added). It is true that this rule is most likely to be implicated in a criminal case by a second or subsequent prosecution. But there is no principled reason not to give effect to the plain meaning of the rule *Ashe* articulated in the rare criminal case where the need for estoppel arises in a "future lawsuit" that does not take the form of a successive prosecution. *See id.* at 444 (collateral estoppel should be applied with "realism and rationality").[7]

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[7] *See also Breed v. Jones*, 421 U.S. 519, 529 (1975) ("We believe it is simply too late in the day to conclude ... that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and

This is one of those rare cases. In *Atkins v. Virginia*, this Court took the highly unusual step of announcing a new, retroactive rule of substantive law rendering a class of individuals categorically ineligible for a death sentence. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("[I]f we held ... that the Eighth Amendment prohibits the execution of mentally retarded persons ..., such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review."). Implicit in the announcement of the *Atkins* rule was a judgment that, with regard to prisoners covered by the rule, states' interests in finality and protection of settled expectations would be overridden. *See Teague v. Lane*, 489 U.S. 288, 308-10 (1989); *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J., concurring in judgments in part and dissenting in part) ("New 'substantive due process' rules ... must ... be placed on a different footing. ... There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). Multiple findings of mental retardation by the Ohio courts (as well as concessions by the State) place Bies within the class

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whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings,' and that 'the juvenile process ... be candidly appraised.'") (footnote omitted) (quoting *In re Gault*, 387 U.S. 1, 50, 21 (1967)).

retroactively covered by *Atkins*. Adherence to the "realism and rationality" prescribed by *Ashe* dictates that the Warden should be estopped from further litigation of the fact of Bies' mental retardation.[8]

II. The Ohio courts made findings of mental retardation to which *Ashe*'s collateral estoppel rule applies.

As described above, collateral estoppel applies "when an issue of ultimate fact has once been determined by a valid and final judgment ..." *Ashe*, 397 U.S. at 443. In this case, the "fact" of Bies' mental retardation has been determined in valid and final judgments by no fewer than three Ohio state courts. First, on direct appeal the Ohio Court of Appeals found that "Bies' psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation ...." J.A. 106. Second, and also on direct appeal, the Ohio Supreme Court found that "Bies' personality disorder and mild to borderline mental

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[8]The Warden's argument that "[t]he civil post-conviction remedy that Bies initiated does not put him in 'jeopardy,'" Pet. Br. 24, misses the point. At the time Bies raised his *Atkins* claim in the state post-conviction court, he already had in hand multiple state court findings that he is a member of a class ineligible for a sentence of death. His state post-conviction petition should therefore have resulted in a simple formalization of what had already been established in fact: that Bies is mentally retarded and his death sentence cannot stand. Instead, the State created the threat of further jeopardy by defying the previous findings (and its own concessions) and insisting that the question of Bies' mental retardation – and consequently his eligibility for a death sentence – be reopened.

retardation merit some weight in mitigation." *State v. Bies*, 658 N.E.2d 754, 761 (Ohio 1996). And third, the Hamilton County Court of Common Pleas twice stated in its July 22, 1998 order denying Bies' first petition for state post-conviction relief that Bies was "mildly mentally retarded." J.A. 148, 153.

The findings made on direct appeal by the Ohio Court of Appeals and the Ohio Supreme Court were essential to those courts' discharge of their direct review responsibilities under state law and the federal Constitution. State law required that the state appellate courts

> review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.

Ohio Rev. Code § 2929.05.

This statutory mandate has long been regarded by Ohio courts as identical to the independent appellate review prescribed by this Court in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and its progeny. *See, e.g., State v. Lundgren*, 653 N.E.2d 304, 323 (Ohio 1995) (stating that "[t]his court's independent assessment pursuant to R.C. 2929.05 eliminates the

effect of any error," and citing *Clemons*); *State v. Combs*, 581 N.E.2d 1071, 1079 (Ohio 1991) (referring to *Clemons* and adding that "R.C. 2929.05 mandates such an independent reweighing in both the court of appeals and this court"); *State v. Landrum*, 559 N.E.2d 710, 729 (Ohio 1990) (citing *Clemons* and *Lott*) ("We have independently reviewed and weighed the evidence as required by R.C. 2929.05(A). In doing so, we have rectified any errors ... that might have affected the weighing of the aggravating circumstance against mitigating factors, or the fundamental fairness and appropriateness of the death penalty determination."). As this Court has repeatedly made plain, a state appellate court performing this function must independently assess the evidence and render the subsidiary findings necessary to a genuine, individualized weighing of aggravating and mitigating circumstances. *See Clemons*, 494 U.S. at 749 ("[S]tate appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime."); *Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record.").

The review of Bies' sentence by the Ohio Court of Appeals and the Ohio Supreme Court was conducted according to § 2929.05 and this Court's decisions. Both state appellate courts expressly indicated that they were undertaking to "independently review" the evidence for the purpose of reweighing. J.A. 104 (Ohio

Court of Appeals) ("[W]e now independently review and weigh the facts and the other evidence disclosed in the record to determine whether the aggravating circumstances outweigh the mitigating factors, if any, demonstrated in the record in accordance with R.C. 2929.05(A)"); *State v. Bies*, 658 N.E.2d at 761 ("Pursuant to our duties imposed by R.C. 2929.05(A), we now independently review the death penalty sentence for appropriateness and proportionality."); *see also* J.A. 146 (Ohio Court of Common Pleas) ("Any error in the sentencing process was corrected by the de novo review by the Court of Appeals and the Ohio Supreme Court. *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441 (1990)."). Furthermore, the Ohio Supreme Court unquestionably assumed the obligation under *Clemons* to make independent findings with regard to each mitigating factor when it declined to review Bies' challenges to the trial judge's sentencing order on the explicit ground that "even if any of Bies' complaints are valid, our independent review will cure any errors or omissions." *State v. Bies*, 658 N.E.2d at 760 (citing *State v. Lott*, 555 N.E.2d 293, 304 (1990) (citing, in turn, *Clemons*));[9] *see also State v. Bies*, 1999 WL 445692 (Ohio App. 1d June 30, 1999) ("Further, any error in the consideration of [a challenged]

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[9]Because the Ohio Supreme Court relied upon its own independent finding and weighing of mitigating circumstances against aggravating circumstances to justify pretermitting review of the trial judge's sentencing order, it was obliged by the Eighth Amendment as well as by Ohio law to make factual findings of the existence *vel non* of each mitigating circumstance, as a precondition to a valid weighing process. See *Parker*, 498 U.S. at 318-320; *Sochor v. Florida*, 504 U.S. 527, 538-40 (1992).

document would have been corrected by the *de novo* review of the sentence by this court and the Ohio Supreme Court.") (citing *Clemons* and *Lott*). Thus, the Ohio appellate courts not only made findings on the question of Bies' mental retardation, they made those findings after independent review of the evidence, and for the express purpose of weighing the sum of the individual mitigating factors against the sum of the individual factors in aggravation.

Finally, in addition to the findings made on direct appeal, the Hamilton County Court of Common Pleas' order denying post-conviction relief twice stated that court's conclusion that Bies was "mildly mentally retarded." J.A. 148, 153. The second of these findings was made in connection with Bies' pre-*Atkins* claim that "it is cruel and unusual punishment to execute a retarded person," J.A. 153, to which the State had responded in part by conceding that "[t]he record reveals defendant to be mildly mentally retarded with an I.Q. of about 69," J.A. 143. The State repeated this concession in its subsequent submissions to the Ohio Court of Appeals, J.A. 160, and the Ohio Supreme Court, J.A. 184.[10]

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[10]The Ohio Court of Appeals declined to consider Bies' post-conviction categorical ineligibility claim on state procedural grounds, J.A. 175-76, and the Ohio Supreme Court denied Bies' request for discretionary review, *State v. Bies*, 719 N.E.2d 4 (Ohio 1999).

III. None of the Warden's theories for avoiding the effect of the state courts' findings (or the State's own concessions) can be sustained.

A. The Warden's claim that mental retardation for mitigation and *Atkins* "are not the same."

The Warden argues that "mental retardation for purposes of mitigation" and "mental retardation for purposes of *Atkins* ... are not the same ... because *Atkins* fundamentally changed the applicable law," and that "[t]he Ohio Supreme Court therefore did not actually resolve the second question when it decided the first." Pet. Brf. 32-33; *see also* Pet. Brf. 34 ("The Ohio Supreme Court could not have decided the *Atkins* issue before there was an *Atkins* issue to decide."). This argument goes wrong from the start by conflating the factual question of whether Bies is mentally retarded with the legal question of how his mental retardation affects his eligibility for a death sentence.

Whether a person suffers from mental retardation is a question of fact. *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) ("Whether Lott is mentally retarded is a disputed factual issue, which we believe is best resolved in the trial court"); *State v. Gumm*, 864 N.E.2d 133, 139 (Ohio App. 1d 2006) ("The determination of whether a capital defendant is, by the *Lott* court's definition, mentally retarded presents a factual issue for the trial court."); *see also, e.g., Clark*

v. Quarterman, 457 F.3d 441, 444 (5th Cir. 2006) ("We agree ... that the question of whether [petitioner] suffers from significantly subaverage intellectual functioning is a question of fact, and not a mixed question of law and fact ...."). While the Warden emphasizes that *Atkins* led to the creation of new procedures and substantive rules for determining the existence of mental retardation as a bar to a death sentence, *see* Pet. Br. 36-42, he does not seriously contest the Sixth Circuit's determination that the factual condition constituting mental retardation in Ohio did not change after *Atkins*. This is as it must be, for as the Sixth Circuit correctly found, the clinical definition of mental retardation adopted by the Ohio Supreme Court in *Lott* is the same as the definition applied by Dr. Winter at the time of Bies' trial. Pet. App. 51a-53a.

The Sixth Circuit further held that the "Ohio trial court's determination that Dr. Winter may not have applied the clinical definition of mental retardation was based on 'an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. § 2254(d)(2).'" Pet. App. 65a. The Warden has effectively conceded this point (Petition for Writ of Certiorari, at 26) and does not identify any record support for the state post-conviction court's agnostic conclusion that the trial court's chosen independent expert witness "may not" have used the then-prevailing and unmistakably clear clinical standards of her profession in making her diagnosis. Rather, the Warden's real challenge to Dr. Winter's diagnosis is that *Atkins* changed the legal

consequences which attach to the state courts' factual findings and the State's own concessions based on that diagnosis prior to *Atkins*. Relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the Warden contends that this change in legal consequences renders the collateral estoppel rule of *Ashe* inapplicable. However, neither the text nor the logic of *Sunnen* applies in this case.

Sunnen stands for the proposition that collateral estoppel does not apply to a *legal* ruling if there has been a major change in law that renders the previous adjudication inconsistent with prevailing doctrine. *See Montana v. United States*, 440 U.S. 147, 161 (1979). The issue in *Sunnen* was whether royalties paid to a shareholder that a court once determined to be non-taxable income were thus forever non-taxable income despite a change in the applicable legal standard. *Sunnen*, 333 U.S. at 596-97. This Court held that issue preclusion did not apply "*in these circumstances*" because the legal matter did not involve the "same bundle of legal principles that *contributed to* the rendering of the first judgment." *Id.* at 602 (emphasis added). The Court reasoned that a contrary rule would cause inequitable administration of the laws:

> [A] change or development in the controlling legal principles may make [the past] determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is

> accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws[.]

Id. at 599; *Montana*, 440 U.S. at 161 (quoting this language as the driving logic in *Sunnen*); *see also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 180 (1984) (noting that *Sunnen* was concerned with avoiding "preferential treatment"); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. c (grounding *Sunnen* rule in avoidance of "inequitable administration of the laws").

Although this Court's decision in *Atkins* undeniably changed the law, that change in law is entirely irrelevant to whether Bies is in fact mentally retarded. *Sunnen*, as characterized in *Montana*, requires that the change in law be "of controlling significance" to the issue in the first proceeding. *Montana*, 440 U.S. at 160. The pre-*Atkins* rule that the state could execute mentally retarded people was not even relevant to, let alone "controlling" of, whether Bies is mentally retarded. *Atkins* changed the *legal* consequences of that *factual* finding, but it is only the factual finding which Bies relies upon as the basis for estoppel.

Moreover, the logic of *Sunnen* does not apply to this case. The respondent in *Sunnen* asked to benefit from a defunct legal standard. Had the Court applied that standard, it would have applied a different legal

rule to the respondent than would apply to other similarly situated parties. By contrast, Bies does not ask to benefit from a legal standard unavailable to similarly situated parties; rather, he seeks only to benefit from the *present* legal standard of *Atkins*. Because the *facts* underlying the past factual finding have not changed, *Sunnen* is inapplicable.

B. The Warden's claim that the mental retardation findings were "not necessary" to the state courts' decisions.

The Warden next argues that collateral estoppel is inapplicable in this case "because a finding regarding Bies' mental retardation was not necessary to the Ohio Supreme Court's decision on direct review."[11] Pet. Br. at 42. This is so, the Warden contends, because although "state law required that the Ohio Supreme Court independently assess the appropriateness of the death penalty and weigh the aggravating and mitigating circumstances," *id.* at 43 (citing Ohio Rev. Code § 2929.05(A)), "the only finding that carries preclusive effect – because it is the only one on which the judgment hinges – is the final outcome of the balancing," *id.* This contention ignores the nature of the inquiry the Ohio appellate courts

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[11]As described *supra*, the Ohio Supreme Court was only one of three state courts to make factual determinations that Bies is mentally retarded. This portion of the Warden's brief does not address the other two. The Warden also omits the State's three express concessions of the fact of Bies' mental retardation during the pre-*Atkins* state post-conviction proceedings.

were required to perform when reviewing Bies' death sentence.

As discussed in part II *supra*, the Ohio Court of Appeals and the Ohio Supreme Court independently reviewed the evidence in order to reweigh the aggravating and mitigating circumstances pursuant to state and federal law. The reweighing was necessary not only as a matter of Ohio law but as a matter of federal Eighth Amendment law, since the Ohio Supreme Court relied upon reweighing to cure any errors that Bies' trial judge may have committed in weighing aggravation against mitigation. *See State v. Bies*, 658 N.E.2d at 760; *see also supra* note 9. This Court's decisions establish quite clearly that when an appellate court in a weighing state undertakes such independent review, it is constitutionally essential for that court to make findings as to the existence of individual mitigating and aggravating factors before those factors can be weighed, and the propriety of a death sentence thereby determined. *See Clemons*, 494 U.S. at 752 ("Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence."); *Parker*, 498 U.S. at 320 ("What the Florida Supreme Court could not do ... was to ignore the evidence of mitigating circumstances in the record ... and affirm the sentence based on a mischaracterization of the trial judge's findings.").

Thus, contrary to the Warden's suggestion, the Ohio appellate courts' identification of mitigating factors – including Bies' mental retardation – was a constitutionally indispensable step in the independent reweighing those courts performed. While Bies' death sentence could have been upheld had the state courts found Bies *not* to be mentally retarded (which they did not), the presence of evidence and argument presenting the question of mental retardation obligated the courts conscientiously to decide the issue one way or the other. For that reason, the mental retardation finding was necessary.

C. The Warden's claim that the State did not have a "full and fair" opportunity to litigate mental retardation prior to *Atkins*.

The Warden maintains that collateral estoppel is not applicable because the State did not have a full and fair opportunity to litigate the issue of Bies' mental retardation prior to *Atkins*. Pet. Br. at 44-46. This argument is legally irrelevant. In *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam), the state made a similar argument in defense of the Supreme Court of Washington's determination that a second trial could go forward, despite prior resolution of an "ultimate fact" against the government, because additional evidence would be available to the prosecution. After noting the state's concession that "the ultimate issue of identity was decided by the jury in the first trial," this Court concluded that "the

constitutional guarantee [of collateral estoppel as part of the double jeopardy guarantee] applies, irrespective of whether the jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U.S. at 56-57; *see also Southern Pacific Railroad Co. v. United States*, 168 U.S. at 52 (describing *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 691 (1895)) ("The essence of estoppel by judgment being that there has been a judicial determination of a fact, ... the question always is, has there been a determination? and not, upon what evidence and by what means was it reached?").

Furthermore, even if it had any legal relevance, the Warden's argument would fail factually. It is based on the faulty premise that because *Atkins* was totally unforeseeable, the State "had little incentive to litigate the issue of a defendant's mental retardation." Pet. Br. at 45. But even prior to *Atkins*, evidence of mental retardation was widely recognized to be one of the most persuasive categories of mitigating evidence. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1564 (1998). Thus, there was the possibility that the Ohio courts would, if they concluded Bies was mentally retarded, either reach a different conclusion as to the balance of aggravating and mitigating circumstances or find the death penalty to be disproportionate. In *State v. Claytor*, 574 N.E. 2d 472, 482 (Ohio 1991), for example, the Ohio Supreme Court relied upon evidence of the defendant's mental defect in concluding: "we cannot find that the aggravating

circumstances of the crime have been shown to outweigh the mitigating factors beyond a reasonable doubt." Other jurisdictions, relying heavily on evidence of the defendant's mild mental retardation, had determined that the death penalty was a disproportionate punishment. *See, e.g., Reddix v. State*, 547 So.2d 792 (Miss. 1989); *State v. Stokes*, 352 S.E.2d 653 (N.C. 1987).

Moreover, at trial, on appeal and in state post-conviction proceedings, Bies relied heavily on his mental retardation in challenging the admissibility of an incriminating statement made to law enforcement. Courts in Ohio and in other jurisdictions had previously determined that a defendant's waiver of *Miranda* rights was not knowing and intelligent due in part to the defendant's mental retardation. *See, e.g., State v. Rossiter*, 623 N.E.2d 645, 649 (Ohio 1993); *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987).

Finally, at the time of Bies' direct appeal and of the state post-conviction proceedings that produced a decision finding Bies mentally retarded but rejecting his federal and state constitutional challenge to executing persons with mental retardation, it was hardly unforseeable that the Ohio Supreme Court, the Ohio legislature, or this Court would determine that the death penalty was an excessive punishment for persons with mental retardation. This Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), did not purport in any shape, fashion, or form to conclusively decide the issue. Rather, the Court decided only that there was not a consensus prohibiting the execution of

persons with mental retardation at that time. *Id.* at 340 ("But we cannot conclude *today* that the Eighth Amendment precludes the execution of any mentally retarded person.") (emphasis added). In short, *Penry* was the beginning, not the end, of a constitutional conversation about the appropriateness of the death penalty for mentally retarded persons such as Michael Bies. As such, *Penry* itself put states on clear notice that a categorical exemption from the death penalty for mentally retarded offenders could come to pass.

In the wake of *Penry*, things began to change rapidly. As this Court noted in *Atkins*, "Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue." *Atkins*, 536 U.S. at 314. In 1990, Kentucky and Tennessee barred the death penalty for mentally retarded persons; New Mexico did so in 1991; Arkansas, Colorado, Washington, Indiana and Kansas followed suit in 1993 and 1994; and when New York reinstated the death penalty in 1995, it expressly exempted persons with mental retardation. In 1998, Nebraska created a similar bar. *Id.* Thus, at the time of Bies' direct appeal in 1996 and the post-conviction proceedings initiated later that same year, the trend was unmistakable.[12] In fact, it was precisely these

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[12]Furthermore, legislation was introduced in the Ohio legislature on two occasions during this period which would have barred the execution of persons with mental retardation. In both the 199th (1991-92) and 120th (1992-94) General Assemblies, bills were introduced which would have precluded the death penalty for persons with mental retardation. *See* H.B. 342, 119th Gen. Assem.

developments which formed the basis of Bies' post-conviction challenge to his death sentence. Bies maintained that "a national consensus against executing the mentally retarded reflects the new standard of decency in the United States," and that because of this new consensus, Bies' death sentence violated both the Eighth Amendment and the Ohio Constitution. J.A. 128-29. It was in response to this claim that the State conceded and the state court expressly found that Bies was "mildly mentally retarded."[13] J.A. 153. Given these events, the State certainly had added incentives to contest the fact of

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(Ohio 1991-92); H.B. 253, 120th Gen. Assem. (Ohio 1993-94).

[13]Given the State's express concession that Bies was "mildly mentally retarded," the Warden's insistence now that the issue of mental retardation should be relitigated warrants application of judicial estoppel. These two positions are clearly irreconcilable, the State persuaded the state post-conviction court to accept its concession, and the Warden would gain an unfair advantage if he were now permitted to distance himself from that concession. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *see also, e.g., Zedner v. United States*, 547 U.S. 489, 504 (2006) (stating that judicial estoppel prevents a party that "assumes a certain position in a legal proceeding, and succeeds in maintaining that position" from later assuming a contrary position, "simply because his interests have changed"); *United States v. McCaskey*, 9 F.3d 368 (5th Cir. 1993) (stating that judicial estoppel is designed to protect the integrity of the judicial process by "preventing internal inconsistency, precluding litigants from 'playing fast and loose' with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment").

Bies' mental retardation.[14]

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[14]This is another instance of the State taking fundamentally inconsistent positions. After this Court rendered its decision in *Atkins*, several inmates challenged their death sentences on the basis of their mental retardation. In *State v. Lorraine*, 2005 Ohio App. LEXIS 2394 (Ohio Ct. App. May 20, 2005), the Warden argued that the defendant was not entitled to a hearing in connection with an *Atkins* claim because, "although mental retardation would not have automatically barred his execution in 1986, a mental retardation diagnosis could certainly have been raised as a mitigating factor." Brief of Respondent at 13, *State v. Lorraine*. In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Warden argued that Lott should be precluded from raising a mental retardation claim post-*Atkins* because, prior to this Court's decision, "Lott still had reasons to pursue a claim of mental retardation if it existed because ... he could have presented the argument in support of the (B)(3) mitigating factor of mental disease or defect." Brief of Respondent at 8, *State v. Lott*.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

RANDALL L. PORTER
Office of the Ohio
Public Defender
250 E. Broad St., Ste. 250
Columbus, OH 43215-2998

S. SCOTT HAYNES
Hallowes, Allen & Haynes
6445 E. Livingston Avenue
Reynoldsburg, OH 43068

JOHN H. BLUME
(*Counsel of Record*)
KEIR M. WEYBLE
SHERI L. JOHNSON
Cornell Law School
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

Counsel for Respondent

REPLY BRIEF

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In the Supreme Court of the United States

DAVID BOBBY, WARDEN,

Petitioner,

v.

MICHAEL BIES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

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REPLY BRIEF OF PETITIONER

The double-jeopardy rule at issue in this case is straightforward: "In a criminal case, collateral estoppel prohibits the Government from relitigating any ultimate facts resolved in the defendant's favor by [a] prior acquittal." *Dowling v. United States*, 493 U.S. 350, 356 (1990) (Brennan, J., dissenting) (citing *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970)). This rule applies only to subsequent prosecutions of defendants who previously were acquitted.

Respondent Michael Bies stakes his case on a much broader application of *Ashe* than this Court has ever endorsed. Two premises are critical to Bies's analysis: first, that *Ashe* applies even where no acquittal exists, and second, that *Ashe* applies even where the government seeks neither to re-prosecute nor to re-punish the offender. If these premises are correct, then *Ashe* announced a free-floating issue-preclusion doctrine that protects defendants who (1) have never obtained a favorable judgment and (2) face no subsequent "jeopardy." In other words, Bies would completely sever the *Ashe* rule from the text of the Double Jeopardy Clause. But this Court has never taken *Ashe* that far. On the contrary, the "collateral-estoppel component of the Double Jeopardy Clause" is just what its label describes—a *component* of the Double Jeopardy Clause. *Dowling*, 493 U.S. at 348.

Even if Bies's understanding of *Ashe* were correct, his application of issue-preclusion rules is not. Bies acknowledges that *Atkins v. Virginia*, 536 U.S. 304 (2002), dramatically altered the legal landscape, and that concession suffices to establish that the Ohio courts did not "actually decide" the *Atkins* issue when they affirmed his conviction and

death sentence. Moreover, any findings as to Bies's mental retardation were not "necessary" because they made no difference in—and in fact ran contrary to—those judgments. Nor did the State of Ohio have a full and fair opportunity to litigate the issue before "*Atkins* established the new standard for mental retardation." *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (per curiam).

ARGUMENT

A. *Ashe v. Swenson* does not apply to Bies's case.

The *Ashe* collateral estoppel rule does not apply to Bies's case for two independent reasons. First, *Ashe* depends on the existence of a prior acquittal, and Bies has never been acquitted of the death penalty. Second, *Ashe*, like all other double-jeopardy principles, protects only defendants who are "twice put in jeopardy," and the civil post-conviction proceeding that Bies initiated in the Ohio courts does not expose him to "jeopardy" of any sort.

1. *Ashe* requires an acquittal, and none occurred here.

"[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal,'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003), and in this case there has not. An "acquittal" occurs if "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate." *Poland v. Arizona*, 476 U.S. 147, 155 (1986) (emphasis and internal quotation marks omitted). The State of Ohio persuaded not

only Bies's jury but also the reviewing state courts that the death penalty was warranted, beyond a reasonable doubt, because the aggravating circumstances outweighed the mitigating circumstances. Pet. App. 111a (jury); J.A. 106 (Ohio appeals court); Pet. App. 120a-121a (Ohio Supreme Court).

The Sixth Circuit determined, Pet. App. 45a, that Bies was "acquitted" when the Ohio Supreme Court found that his evidence of "mild to borderline mental retardation merit[ed] some weight in mitigation," Pet. App. 120a. The Sixth Circuit reasoned that the Ohio Supreme Court's statement amounted to an "acquittal" under *Sattazahn* because it sufficed to establish Bies's legal entitlement to a life sentence. Pet. App. 45a. As the Warden's opening brief explained (Pet. Br. 14-17), that novel definition of "acquittal" contradicted this Court's decisions in *Sattazahn*, *Poland*, and *Arizona v. Rumsey*, 467 U.S. 203 (1984).

Bies appears to jettison the Sixth Circuit's erroneous reasoning and instead argues (Br. 8, 13) that "nothing in *Ashe* or the substantial body of decisions upon which it relies establishes a formal acquittal as a precondition to the applicability of collateral estoppel." Rather, *Ashe* simply requires "'a valid and final judgment' . . . regardless of whether that judgment takes the precise form of an 'acquittal.'"

The Court indicated several times in *Ashe*, however, that it was crafting a rule that applies only to earlier acquittals. The Court underscored the defendant's "previous judgment of *acquittal*," 397

U.S. at 444 (emphasis added); emphasized that the double-jeopardy bar "surely protects a man who has been *acquitted* from having to 'run the gantlet' a second time," *id.* at 446 (emphasis added and citation omitted); and explained how to apply its rule in cases "where the first judgment was based upon a general verdict of *acquittal*," *id.* at 444 (emphasis added).

Later decisions by both this Court and lower courts confirm that *Ashe* depends on an earlier acquittal. This Court consistently has described the issue-preclusion rule in *Ashe* as relevant only where "a prior acquittal" exists, *Brown v. Ohio*, 432 U.S. 161, 165 (1977), and has applied *Ashe* to bar subsequent prosecutions only following earlier acquittals, see, e.g., *Turner v. Arkansas*, 407 U.S. 366, 369-70 (1972) (per curiam); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam). The federal courts of appeals are in accord. See Pet. Br. 21-22 (citing cases). Bies makes no effort to distinguish or rebut this long line of cases, nor does he cite any cases applying *Ashe* without a prior acquittal.

Instead, Bies relies on two cases that preceded *Ashe* (Br. 14-15) for the proposition that, at least in theory, *Ashe* does not require an earlier acquittal. Neither case, however, supports Bies's position. The first case—*United States v. Oppenheimer*, 242 U.S. 85 (1916)—afforded double-jeopardy protection to a prior acquittal. After the defendant obtained "a judgment of acquittal on the ground of the statute of limitations," the government tried to prosecute him again on "the same offence." *Id.* at 86-87. This Court barred the retrial. *Id.* at 88. The Court

explained that, "when a man once has been acquitted on the merits," the Fifth Amendment—following "what in the civil law is a fundamental principle of justice"—does not permit "the Government to prosecute him a second time." *Id.* at 88. *Oppenheimer* accordingly confirms that the criminal collateral estoppel rule depends on a first acquittal. See also *Sealfon v. United States*, 332 U.S. 575, 578 (1948) (citing *Oppenheimer* in holding that res judicata barred the government from prosecuting a defendant for fraud after he was acquitted of conspiracy to commit the same fraud).

The second case that Bies cites is beside the point because it is not a double-jeopardy case. The petitioner in *Frank v. Mangum*, 237 U.S. 309, 324-25 (1915), claimed that disorder and hostile community sentiment, among other things, deprived him of due process during his capital murder trial. The question before this Court was the weight that federal courts sitting in habeas should give to the Georgia Supreme Court's earlier findings on that due process claim. *Id.* at 333-34. The Court cited what is now recognized as the issue-preclusion rule, *id.* at 334, and decided to credit the state-court findings, *id.* at 336. At no point, however, did the Court address whether the jury's guilty verdict carried any preclusive effect, because that question was not presented.

Given the complete dearth of authority for Bies's position, one of two things must be true: either (1) Bies's reading of *Ashe* is incorrect, and the collateral estoppel component of the Double Jeopardy Clause protects only those defendants who have in

hand an earlier acquittal; or (2) Bies's reading of *Ashe*, while plausible, is not clearly established by this Court's decisions. If the former is true—and the Warden maintains that it is—then Bies cannot claim double-jeopardy injury. But even if the latter is true, then the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") bars federal habeas relief. 28 U.S.C. § 2254(d)(1).

2. *Ashe* does not apply absent re-prosecution or re-punishment.

The Double Jeopardy Clause protects only those defendants who are "twice put in jeopardy." U.S. Const., amend. V. "Jeopardy" means either a "successive punishment" or a "successive prosecution." *United States v. Dixon*, 509 U.S. 688, 704 (1993). A civil *Atkins* hearing on state post-conviction review is neither a second punishment (because the original punishment, not a new one, is at issue) nor a second prosecution (because the State did not initiate the action). See Pet. Br. 25-27.

Bies's chief argument in response is that *Ashe* applies even without the presence of a second jeopardy. He frames *Ashe*'s rule this way: "'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties *in any future lawsuit*." Br. 16 (quoting *Ashe*, 397 U.S. at 443 (emphasis added by Bies)). Thus, Bies submits (Br. 16-17), *Ashe*'s estoppel rule can arise in "rare cases" that do not "take the form of a successive prosecution."

Bies's argument loses sight of the fact that this case arises under the Double *Jeopardy* Clause. The Clause contains two parts: "nor shall any person be subject [1] for the same offence [2] to be twice put in jeopardy of life or limb." U.S. Const., amend. V. *Ashe* is in tension with the first part—the "same offence" language—because it bars subsequent prosecutions of offenses that, strictly speaking, are different. See *Dixon*, 509 U.S. at 704-05 (observing that *Ashe* can apply to cases that are not the same offense under *Blockburger v. United States*, 284 U.S. 299, 304) (1932)); see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1828 (1997) (same). In *Ashe* itself, for instance, the defendant was acquitted of robbing one of six victims at a poker game. The Court held that the acquittal prevented the government from prosecuting the defendant for robbing any of the remaining five victims, even though the robberies of those other victims constituted different crimes under the same-elements test. 397 U.S. at 446.

Bies would have the Court turn this partial infidelity to the Double Jeopardy Clause's text into a full divorce by abandoning the "put in jeopardy" requirement as well. But if *Ashe* requires neither the "same offence" nor a second "jeopardy," then nothing binds the collateral estoppel component to the Clause from which it derives. What remains instead is a free-floating constitutional rule of issue preclusion for defendants who once were criminally prosecuted.

Such a standalone doctrine of criminal collateral estoppel finds no basis in the

Constitution's text or this Court's case law, including *Ashe*. This Court long ago rejected the invitation to create such a rule under the Due Process Clause. See *Hoag v. New Jersey*, 356 U.S. 464, 471-72 (1958). And *Ashe* emphasized that it was drawing a constitutional line that prevented the State from attempting to "hale [a defendant] before a new jury" to relitigate a settled issue. 397 U.S. at 446. Bies does not cite a single case holding that *Ashe* applies where no second jeopardy exists. Nor does he attempt to distinguish the litany of cases cited in the Warden's brief (Pet. Br. 28-29) holding that *Ashe* requires a subsequent prosecution. Bies likewise leaves unanswered the Warden's argument (Pet. Br. 30-32) that requiring Bies to carry the burden on his *Atkins* claim does not offend the finality, repose, and anti-harassment interests of the Double Jeopardy Clause.

Bies suggests a different theory in a footnote (Br. 18 n.8): that "the State created the threat of further jeopardy by . . . insisting that the question of Bies' mental retardation—and consequently his eligibility for a death sentence—be reopened." Although not perfectly clear, this argument appears to be that the State placed Bies under "the threat of further jeopardy" when it opposed his motion to vacate his death sentence. But in the civil post-conviction proceeding at issue, the State is simply defending against collateral attack its legitimate and "strong interest in the finality of criminal convictions." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). It is not exposing Bies to any "jeopardy," and certainly not to the sort of additional "*criminal* punishment" against which the Double Jeopardy

Clause protects. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

At the very least, this Court's case law does not clearly establish that *Ashe* applies in civil cases where no re-prosecution or re-punishment is at issue. 28 U.S.C. § 2254(d)(1). Bies is therefore not entitled to the habeas writ.

B. Even if *Ashe* applies to this case, issue preclusion does not.

Even assuming that the collateral estoppel component of the Double Jeopardy Clause applies absent both an acquittal and a second jeopardy, Bies is entitled to no relief for an additional reason: He has not satisfied the requirements for issue preclusion. The state post-conviction court concluded as much, see Pet. App. 102a-104a, and that reasonable conclusion must stand under AEDPA, 28 U.S.C. § 2254(d)(1)-(2).

1. *Atkins* effected a substantial change in the law that prevents the application of issue preclusion.

Bies agrees (Br. 9) with the Warden on at least one significant point: that "the legal consequences which attach to the factual determinations that Bies is mentally retarded certainly changed with *Atkins*." The parties disagree, however, on whether that significant change prevents the application of issue preclusion in Bies's favor. Bies argues (Br. 26-27) that it does not because the underlying factual question—whether Bies is mentally retarded—remains the same. Assuming that Bies is correct that a mental-retardation determination is a factual

inquiry and that the root facts have not changed, he is wrong about the law of issue preclusion. Significant legal changes preclude the operation of collateral estoppel even where the underlying historical facts remain the same.

Issue preclusion does not apply—because the issue is not "actually decided"—when "controlling . . . legal principles have changed significantly since the [earlier] judgment." *Montana v. United States*, 440 U.S. 147, 155 (1979). "Even if the issue is identical and the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially 'the same bundle of legal principles that contributed to the rendering of the first judgment.'" *Neaderland v. Comm'r of Internal Revenue*, 424 F.2d 639, 642 (2d Cir. 1970) (quoting *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 602 (1948)). Hornbook statements of issue-preclusion rules are to the same effect. See 18 James Wm. Moore et al., *Moore's Federal Practice* § 132.02[2][f] (3d ed. 2008); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4425, p. 674 (2d ed. 2002); Restatement (Second) of Judgments § 28 cmt. c (1982).

The only question, then, is whether the applicable "legal principles have changed *significantly*"—or, put differently, whether a "major doctrinal shift[]" has occurred—since the initial judgment. *Montana*, 440 U.S. at 155, 162 (emphasis added). Bies acknowledges (Br. 17, 26) that this Court "undeniably changed the law" in *Atkins*. That point of agreement resolves the matter. "[T]he

application of collateral estoppel against the [State] in this case would exemplify blind reliance upon doctrine in the face of obviously substantial dissimilarities between the legal principles governing the civil suit and those which were applicable in the criminal prosecution which preceded it." *Neaderland*, 424 F.2d at 643.

2. Any mental retardation findings were not "necessary" to the judgments affirming Bies's death sentence.

"[C]ollateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action." *Haring v. Prosise*, 462 U.S. 306, 315 (1983). An issue is "necessary" or "essential" when the judgment was "dependent on the determination made of the issue in question." *Moore's Federal Practice* § 132.03[4][a]. As Bies himself seems to acknowledge (Br. 29), the state courts could have come out either way on the question of Bies's mental retardation and still affirmed his death sentence. Because the issue made no difference to the judgments, it carries no preclusive effect. See Restatement at § 27 cmt. h.

Bies argues that the mental-retardation issue was necessary in a different sense. Ohio law required the Ohio Supreme Court (and the intermediate appellate court) on direct appeal to reweigh the aggravating and mitigating circumstances and independently assess the appropriateness of the death penalty. See Ohio Rev. Code § 2929.05(A) (LexisNexis 1996). The parties agree that the Ohio courts undertook that review in

this case. See J.A. 106; Pet. App. 118a-121a. But the fact that an independent evidentiary weighing was required does not mean that any particular mitigation finding was "necessary to the judgment" for issue-preclusion purposes.

"[F]indings contrary to the judgment are not necessary and do not support issue preclusion." *Federal Practice and Procedure* § 4421, p. 552. "This is especially true when the issue in the prior case was decided adversely to the party that prevailed in the ultimate judgment." *Moore's Federal Practice* § 132.03[4][k][ii]; see, e.g., *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457 (2d Cir. 1995). Assuming the state courts' statements on direct review concerning Bies's mental-retardation evidence amounted to factual findings (see Pet. Br. 33), they fall squarely within the category of findings "considered unnecessary for purposes of issue preclusion," because, far from supporting the judgments affirming Bies's death sentence, they "would support an opposite judgment." *Moore's Federal Practice* § 132.03[4][k][ii].

The *Ashe* line of cases provides another way to reach the same conclusion. *Ashe* applies "when an issue of ultimate fact has once been determined by a valid and final judgment," *Ashe*, 397 U.S. at 443, or when the first adjudication resolves "an ultimate issue" in the second case, *Dowling*, 493 U.S. at 348; see also *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) (applying *Ashe* after "[t]he State concede[d] that the ultimate issue of identity was decided by the jury in the first trial"). Because the boundary between "ultimate facts" and "evidentiary"

or "mediate facts" is "notoriously obscure," Ruth B. Ginsburg, *Special Findings and Jury Unanimity in the Federal Courts*, 65 Colum. L. Rev. 256, 259 (1965), most courts and commentators have abandoned the distinction to focus instead on "whether the issue was actually recognized by the parties as important and by the trier of fact as necessary to the first judgment." Restatement at § 27 cmt. j; see also *Moore's Federal Practice* § 132.03[4][j][ii] (citing cases for the proposition that "most courts now reject the distinction"). Still, "the very conclusion that a particular determination did not involve any ultimate issue may be taken to show that it was not necessary to the result." *Federal Practice and Procedure* § 4421, p. 545. That is true here. The "ultimate issue" at Bies's penalty phase was not whether he was mentally retarded; it was whether the death penalty was appropriate because the aggravating circumstances in the case outweighed his mitigating evidence. Any findings concerning Bies's mental retardation therefore were not necessary to the judgments for the State.

3. The State has not had a full and fair opportunity to contest the issue of Bies's mental retardation.

"[I]ssue preclusion can only be applied against parties who have had a prior 'full and fair' opportunity to litigate their claims." *Moore's Federal Practice* § 132.04[1][a][ii]. In this case, the State lacked such a full and fair opportunity in two respects: (1) The State could not have foreseen that *Atkins* would substantially change the legal relevance of mental-retardation evidence in capital

trials; and (2) the State had no chance to appeal the findings as to Bies's mental retardation. See Pet. Br. 44-46.

Bies first responds (Br. 9, 29-30) that the Warden's argument is "legally irrelevant" because the State's desire to produce more or different evidence on relitigation does not change the fact that the issue has been decided. But the Warden is not asking for a second bite at the apple; the point is that the Warden never had a first bite at *this apple*. "Substantial changes in the legal context [and] the consequences of the issue . . . support the conclusion that the initial opportunity was not sufficient to support preclusion." *Federal Practice and Procedure* § 4424, p. 641.

To this argument Bies answers (Br. 31-34) that *Atkins* was "hardly unforeseeable." He explains that *Penry v. Lynaugh*, 492 U.S. 302 (1989), "put states on clear notice that a categorical exemption from the death penalty for mentally retarded offenders could come to pass." After *Penry*, "things began to change rapidly," and by "the time of Bies' direct appeal in 1996 . . . the trend was unmistakable." The State of Ohio therefore had ample "incentives to contest the fact of Bies' mental retardation."

Bies's argument disregards the rule of *stare decisis* and would impose an impossible burden on the States. The State of Ohio was not just entitled to rely on *Penry* as controlling precedent before *Atkins*; it was required to do so. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (explaining that *stare decisis* "fosters reliance on judicial decisions"). Moreover,

the rules of issue preclusion did not require prosecutors in Ohio to follow legislative developments in other States in order to know how vigorously to contest Bies's mitigation evidence. Instead, the State reasonably relied on settled law and treated Bies's mental-retardation evidence the way the Ohio Supreme Court treated such evidence—as meriting "some weight" under the State's catch-all mitigation factor. *State v. Fears*, 715 N.E.2d 136, 155 (Ohio 1999) (citing Ohio Rev. Code § 2929.04(B)(7)).

The State had no full and fair opportunity to contest Bies's mental-retardation claim for a second reason: It could not appeal the state courts' findings on direct appeal after those courts ruled in the State's favor. "[C]ollateral estoppel does not apply to an unappealable determination." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998).[1] The State of Ohio prevailed in Bies's direct appeal when both the intermediate appellate court and the Ohio Supreme Court affirmed his conviction and sentence. J.A. 106-07; Pet. App. 121a. Bies does not dispute that the State could not have appealed the statement that "Bies's personality disorder and mild to borderline mental retardation merit some

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[1] In this respect, the "full and fair opportunity" element of issue-preclusion analysis dovetails with the "necessary to the judgment" prong. A party who loses on an ancillary issue but wins a favorable judgment cannot appeal on the ancillary issue. But the prevailing party is not later estopped on that issue because it ran contrary to, and thus was unnecessary to, the judgment. *Balcom v. Lynn Ladder & Scaffolding Co.*, 806 F.2d 1122, 1127 (1st Cir. 1986) (per curiam); see also *Moore's Federal Practice*, § 132.03[4][k][ii].

weight in mitigation." Pet. App. 120a. And even if the State could have appealed, it had no reason to do so. Issue preclusion therefore does not apply.

C. Bies's judicial estoppel argument is both factually and legally incorrect.

Bies argues (Br. 33 n.13) that earlier statements by the State contradict the Warden's position in this case and warrant the application of judicial estoppel. That argument is misplaced.

As an initial matter, legal obstacles prevent the Court from reaching Bies's judicial estoppel argument. First, the claim is unexhausted, see *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), and federal habeas relief cannot be granted on unexhausted claims. 28 U.S.C. § 2254(b)(1)(A). Second, Bies waived his judicial-estoppel claim by not including it in his Third Amended Habeas Petition. See 6th Cir. J.A. 421-26. Third, because judicial estoppel is an equitable doctrine, not a command of the Constitution or federal law, see *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), it affords no basis for federal habeas relief. See 28 U.S.C. § 2254(d)(1) (allowing federal habeas relief only if the state court's decision was "contrary to" or "an unreasonable application of" "clearly established Federal law").

Even if the Court were to reach the merits of Bies's judicial-estoppel claim, the elements of the doctrine favor the State, not Bies. See generally 18B Wright, Miller & Cooper, *Federal Practice & Procedure* § 4477 (2d ed. 2002). To begin with, the State did not take "'clearly inconsistent'" or

misleading positions. *New Hampshire*, 532 U.S. at 750 (citation omitted). Viewed in context, the statements that Bies identifies (Br. 1, 3, 17, 22, 27 n.11, 33 n.13) as the State's concessions that he is mentally retarded were merely instances in which the State summarized Bies's mitigation arguments. See J.A. 66, 143. Even assuming the statements were concessions of a sort, at most the State admitted that Bies's IQ falls in the range of mental retardation. But after *Atkins*—under what the Ohio Supreme Court called "th new standard for mental retardation," *Lott*, 779 N.E.2d at 1015—"IQ tests . . . alone are not sufficient to make a final determination on this issue." *Id.* at 1014. Instead, a full concession as to mental retardation also should have addressed the remaining elements of the post-*Atkins* standard—deficiencies in adaptive skills and onset before the age of eighteen. *Id.*; see, e.g., American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 76 (10th ed. 2002) (explaining that adaptive skills should be tested by "standardized measures"). The State's earlier statements did not address those other required factors because no record evidence existed on those factors. The statements therefore are consistent with the State's later, post-*Atkins* position regarding the question of Bies's mental retardation.[2]

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[2] Bies separately suggests (Br. 2 n.2, 24) that the Warden's Petition for Writ of Certiorari conceded the accuracy and completeness of Dr. Winter's testing methods, but again Bies takes the Warden's words out of context. As already explained (Reply in Supp. of Pet. for Cert. 8-9), the Warden in the passage at issue simply was summarizing the Sixth Circuit's findings

Furthermore, the State did not induce the state courts' reliance. See *New Hampshire*, 532 U.S. at 750-51. The State's briefs on direct appeal accurately stated that Bies "was *supposedly* retarded and/or low intelligence," without inviting a holding on the matter in Bies's favor. J.A. 78 (emphasis added); see also J.A. 120 (same). Meanwhile, the state appellate court on Bies's first round of post-conviction review invoked a procedural bar when it rejected Bies's mental-retardation claim. J.A. 176. Nothing the State might have said on the substance of Bies's mental-retardation claim in those proceedings could have affected that procedural ruling.

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and reasoning. Far from conceding that Dr. Winter used the required analysis, the Warden has catalogued the deficiencies in her testing methods (Pet. Br. 39-40).

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
KIMBERLY A. OLSON
Deputy Solicitors
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.mizer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

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